TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 344.

WILLIAM C. HOLGATE AND HENRY NEWBEGIN, APPELLANTS,

vs.

RUFUS I. EATON, ADMINISTRATOR OF ELIZABETH R. EATON, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 9, 1882.

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1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, eastern division, held at the United States court-rooms, in the city of Cleveland, in district aforesaid, before the Honorable John Baxter, circuit judge for the sixth circuit, on the 13th day of February, being a day of the January term, A. D. 1882, of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and six.

AUGUSTUS J. RICKS, *Clerk.*

2 *Bill.*

United States Circuit Court, Northern District of Ohio. In Equity.

To the honorable the judges of the circuit court of the United States within and for the northern district of Ohio:

(12) Elizabeth R. Eaton, of Fryeburg, in the State of Maine, and (13) a citizen of said State, by her next friend, Rufus J. Eaton, of Hamilton, in the State of New York, a citizen of said State, brings this her bill of complaint against William C. Holgate and Henry Newbegin, of Defiance, in the State of Ohio, citizens of said State, and of said northern district of Ohio.

And thereupon your orator complains of the said William C. Holgate, Henry Newbegin, and says, that on or about the thirtieth day of July, A. D. 1874, one John B. Eaton, being the husband of your orator, and holding the title in fee simple, but in trust for your orator, of the premises hereinafter described, executed and delivered to said Holgate a warranty deed of said premises, which the said Holgate procured*ed* to be duly recorded in the records of Defiance county on the same day. An agreement in writing was entered into between said John B. Eaton and the said William C. Holgate, of which the following is a copy:

"DEFIANCE, OHIO, *July 30th*, 1874.

"This memorandum witnesseth, that John B. Eaton, of Fryeburg, Maine, has this day sold to Wm. C. Holgate, 'that part of the east half of section twenty-seven (27,), T. 4 N., R. 4 E., lying be-
3 tween the Fort Wayne road and the W. & E. Canal, and containing 95 acres, more or less, excepting $12\frac{75}{100}$ acres now held by Michael Gorman, all more fully described and set forth in a deed this day executed by said John B. Eaton to said Holgate. It is understood said Holgate is to pay for said land the sum of six thousand dollars, and any valid tax claim Adam Wilhelm may hold on said premises, one thousand dollars of which is to be paid on or before October 1st next; two thousand dollars in six months thereafter; fifteen hundred dollars ($1,500.00) in one year thereafter, and fifteen hundred dollars in two years thereafter, with interest from and after October first. It is further understood said Eaton is to execute another deed of warranty, his wife being joined with him as grantor in same, and to forward said deed on to H. Newbegin for said Holgate,

which is to be substituted for the deed this day executed to said Holgate as aforesaid. And said Eaton agrees to send on to said Newbegin the mortgage and notes on which the judgment was taken by which his title was acquired, in case he can find same, which are to be filed according to law. It is further understood and agreed that if, on or before said October first, from any cause, said Holgate shall prefer not to hold said premises on the terms herein set forth, said Eaton agrees to repurchase same of him, and to release any instalment that is unpaid of said Holgate, or portion of same, and the obligation to pay said Wilhelm's tax claims: also to refund with interest four hundred dollars ($400.00) this day advanced on said $1,000.00 instalment to come due Oct. 1st next, and for any advancements to said Eaton by said Holgate, that is or may be made, said Holgate shall have a lien on said premises, and may hold the
4 title for same as security till such advancements shall be adjusted. If, however, said Holgate shall be satisfied with said purchase on account of quality of land and all other particulars, he shall, at any time after sixty days, on demand of said Eaton, execute and deliver his notes for any unpaid part of said installments, secured by mortgage on the premises. It being understood that any amount the railway companies may pay over for the portion of said premises between the two railways shall be credited on the said $6,000.00 to be paid by said Holgate, or to go to said Eaton, less advancements aforesaid, if said Holgate shall prefer to release and reconvey his interest in the premises aforesaid. Given under our hands and seals the day and year above written.

J. B. EATON. [SEAL.]
WM. C. HOLGATE. [SEAL.]

Attest:
HENRY NEWBEGIN.

And your orator further shows unto your honors, that the said John B. Eaton fully and faithfully performed his portion of said contract or agreement, and that pursuant to the terms thereof, after the 1st of October, 1874, at the request of said Holgate, a new deed of warranty of said lot or parcel of land was executed by said John B. Eaton, and your orators, his wife, and tendered on or about the first day of October, A. D. 1876, to said Holgate and Newbegin. Your orator is informed that said defendant, Holgate, had previously executed a deed to said defendant, Newbegin, by which there was conveyed to said Newbegin one-half of said premises. And your orator further shows unto your honors, that after said premises were sold to said Holgate, said Holgate and Newbegin entered into possession of the same, and retain possession thereof at the pres-
5 ent time. And your orator respectfully represents, that on or about the 1st day of October A. D. 1874, and in pursuance of the terms of the above agreement, the said William C. Holgate and the said Henry Newbegin, who, your orator prays, may be made parties defendant to this bill, executed a mortgage to your orator in fee simple upon the following real estate, situate in the county of Defiance, State of Ohio, to wit: That part of the east half of section

twenty-seven (27), in township four (4) north, range four (4) east, lying between the Fort Wayne road and Wabash and Erie canal, excepting therefrom all thereof lying north of the line of the T. U. & U. R'y tract, and also excepting therefrom some twelve acres heretofore conveyed by one Michael Gorman, and also some five acres upon which the Weisenberge saw-mill stands, and which mortgage, bearing date the day and year last aforesaid, was executed as aforesaid in order to secure the payment of two certain promissory notes of the said William C. Holgate and the said Henry Newbegin of even date with said mortgage, one of which is for the sum of $1,500.00, payable, with interest thereon, to your orator, on or before the first day of October, A. D. 1875, and the other of which is for the sum of $1,500.00, payable on or before the first day of October, A. D. 1876. And your orator further represents that the said two sums of $1,500.00 each were not paid to your orator at the time limited in said mortgage, and that thereby the estate of your orator in said mortgaged premises became absolute at law.

And your orator further respectfully represents that the said two sums of $1,500.00 each, together with a considerable arrear of interest accrued thereon, are now due to your orator on the security of said premises, and that your orator hath frequently, and in a friendly manner, applied to said Holgate and Newbegin, and requested to pay the same, or to release their equity of redemption in said mortgaged premises, which the said Holgate and Newbegin refuse to do. And your orator further represents that she has been, and is, ready to furnish to said defendants such a warranty deed of said premises as by said agreement aforesaid it was agreed that the said defendants should receive.

Your orator represents that said notes and mortgage are her separate property, and, further, that the real estate referred to in said agreement and deeded by the said John B. Eaton to said William C. Holgate was the separate and individual property of your orator, and that though the legal title to the same was then in the said John B. Eaton, yet he held said property in trust for your orator.

Your orator, therefore, prays for process of subpœna against the said William C. Holgate and Henry Newbegin, and that they may, upon their corporal oaths, to the best of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that an account may be taken, under the direction and decree of this honorable court, of what is due upon said mortgage and notes, and that the said William C. Holgate and Henry Newbegin may be decreed to pay unto your orator what shall thus appear to be due, with the costs of this suit, by an early day, to be appointed by this honorable court, your orator being ready and willing, and hereby offering, on being paid his said money and interest and costs at such appointed time, to reconvey said mortgaged premises to the said William C.
7 Holgate and Henry Newbegin, as this honorable court shall direct, and in default of such payment that said *said* mortgaged premises may be sold, and the proceeds applied to the payment of the same so found to be due unto your ora'or, and that the

balance, if any after such payment, may be so applied as this honorable court shall direct. And your orator prays that he may have such other and further relief in the premises as to your honors shall seem meet; and he will ever pray, &c.

ELIZABETH R. EATON,
Suing by her next friend, Rufus J. Eaton,
By WILLEY & GUERNSEY,
Her Solicitors.

STATE OF OHIO, } ss:
Cuyahoga Co., }

George Willey, being duly sworn, says that he is solicitor for the complainant aforementioned; that said complainant and her said next friend are non-residents of and absent from said State of Ohio, and that the facts stated and allegations made in the foregoing bill are true, as he verily believes.

GEORGE WILLEY.

Sworn to before me, by the said George Willey, and by him subscribed in my presence, this 5th day of December, A. D. 1877.

CHARLES BALFOUR,
Notary Public.

Endorsed: Filed Dec. 5th, 1-77. Refiled as amended, Dec. 4th, 1-77.

And afterwards, to wit, on the 5th day of Dec., A. D. 1877, the following subpœna was issued in this cause in this court:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

8 The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon William C. Holgate, Henry Newbegin, and John B. Eaton, if they be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleaveland, on the first Monday in January next, to answer a certain bill in chancery filed and exhibited in said court against them by Elizabeth R. Eaton, by her next fried, Rufus J. Eaton. Hereof they are not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of December, A. D. 1877, and in the 102d year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk.*
By GEO. WYMAN, *Deputy Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this

suit in the clerk's office of said court, on or before the first Monday of January, 1878, otherwise the said bill may be taken *pro confesso*.

EARL BILL, *Clerk*.

NORTHERN DISTRICT OF OHIO, *ss*:

On the 7th day of Dec., 1877, I delivered a true and duly certified copy of this writ to each of the within named, Wm. C. Holgate and Henry Newbegin, at Defiance, Defiance county, Ohio. The within named John B. Eaton not found, neither has he a residence in this district.

N. B. PRETICE, *U. S. Marshal*.
By J. F. DEATNIK, *Deputy*.

Service	$4 00
Copies	1 50
Travel, 165 m.	9 90
	$15 40

Amendment to Bill.

And afterwards, to wit, on the 14th day of Dec., A. D. 1877, the following amendment to bill was filed in this cause in this court:

UNITED STATES CIRCUIT COURT, *Northern District of Ohio*, } *ss*:

ELIZABETH R. EATON, by her next friend, RUFUS J. EATON, *vs.* WILLIAM C. HOLGATE AND HENRY NEWBEGIN. } In Equity. Amendment to Bill.

And now comes the complainant and, by leave of the court first had and obtained, amends her bill heretofore filed in the above-entitled cause, in the following particulars, to wit:

Page 1, lines 12 and 13, read "Elizabeth R. Eaton, of Fryeberg, in the State of Maine," instead of Elizabeth R. Eaton, of Camilles, in the State of New York." Page 1, lines 21, 22 and 23, omit "and against John B. Eaton, of Fryeburg, in the State of Maine, a citizen of said State." Page 1, line 26, omit "and John B. Eaton." Line 26, omit "and John B. Eaton, which being erased in original was omitted in making transcript. Page 5, line 13, insert "on or about the 1st day of Oct. A. D. 1876," after the word "tendered," which was inserted in transcript, being interlined in original. Page 8, omit lines one to seven, inclusive, being the following passage, to wit: "Your orator further represents that she is informed that the said John B. Eaton, of Fryeburg, in the State of Maine, and a citizen of said State, has, or claims to have, some interest in the aforesaid premises; and she therefore prays that said Eaton may be made party defendant herein, under the statute of the United States in such cases made and provided," (which being erased in original was omitted in transcript). Also, page 8, lines

18 and 19, omit the words "with said John B. Eaton," (which being erased in original was omitted in transcript).

ELIZABETH R. EATON,
Suing by her next friend, Rufus J. Eaton.
WILLEY & GUERNSEY,
Her Solicitors.

Continuance.

And afterwards, to wit, on the 31st day of December, A. D. 1877, being a day of the October term, A. D. 1877, of said court, this cause was continued to the next term of said court.

Entry of Appearance.

And afterwards, to wit, on the 31st day of January, A. D. 1878, being a day of the January term of said court, the following entry of appearance was filed in this cause in this court, being in the words and figures following, to wit:

Circuit Court of U. S., Northern District of Ohio.

ELIZABETH R. EATON, by her next friend, RUFUS J. EATON
vs.
WILLIAM C. HOLGATE, HENRY NEWBEGIN, and JOHN B. EATON.
No. 3549. In Chancery.

11 Now come the defendants, William C. Holgate and Henry Newbegin, each in person, and severally saving and reserving to themselves and each of them any and all rights of defense they may have herein, severally enter their appearance in the above-entitled suit. Thus done at Defiance county, in said district, this 2d day of January, A. D. 1878.

WM. C. HOLGATE,
HENRY NEWBEGIN,
In person.

Attest: HENRY B. MAJOR.

And afterwards, to wit, on Friday, January 25th, 1878, being a day of the January term, A. D. 1878, of said court, the following order was entered in this cause in this court, to wit:

FRIDAY, *January 25th*, A. D. 1878.

January Term, 1878.

ELIZABETH R. EATON, by her next friend, RUFUS J. EATON,
vs.
WILLIAM C. HOLGATE and HENRY NEWBEGIN.
No. 3549.

Before the honorable Martin Welker, district judge, &c.

On motion leave is given said defendant to answer herein, on or before the 6th day of March next.

And afterwards, to wit, on the 4th day of March, A. D. 1878, the following demurrer and answer of defendants was filed in this cause in this court.

Answer.

UNITED STATES CIRCUIT COURT, *Northern District of Ohio.* } In Equity.

12 The joint and several demurrers of William C. Holgate and Henry Newbegin to a part, and their joint and several answer to the residue, of the bill of complaint of Elizabeth R. Eaton, complainant, by her next friend, Rufus J. Eaton.

These defendants, by protestation, not confessing any of the matters in and by said bill complained of to be true in manner and form as the same are set forth, severally say that they are advised that there is no matter or thing in said bill good and sufficient in law to call these defendants to account in this honorable court for the same, but that there is good cause of demurrer thereunto, and they do demur accordingly, and for causes of demurrer say:

1st. That it appears by the said complainant's said bill that there is no privity between the said complainant and these defendants to enable said complainant to call upon these defendants for payment of any debt due by virtue of said contract, notes, or mortgage set up in said complainant's bill.

2nd. That it appears by the said complainant's bill that John B. Eaton, therein named, is a necessary party to the said bill, inasmuch as the said contract in said complainant's bill copied and set out on which said claim of said complainant is founded, was made and entered into by and between the said John B. Eaton and these defendants. And as to the residue of said bill these defendants, not waiving their demurrer, but relying thereon, and saying and reserving to themselves now, and at all times hereafter, all manner of benefit and exception which can be had to the residue of said bill,

13 for answer thereto, or to so much thereof as these defendants are advised it is in any wise material or necessary for them to answer unto, answer and say:

They admit that about July thirtieth, A. D. 1874, the said John B. Eaton, of Fryeburg, in the State of Maine, executed and delivered to said Holgate a warranty deed for said premises in said bill described, and at the same time entered into an agreement in writing with the said John B. Eaton, of which the copy given in said bill is substantially correct, and that said Holgate conveyed to said Newbegin his rights in the undivided one-half of said premises.

And these defendants further answering say, that at the time of the making of the said contract said John B. Eaton was at Defiance, in the State of Ohio, looking after the interests of said trust property, about which it became necessary for him to incur expenses and make advancements in money; that he endeavored to sell said property to divers persons in the village of Defiance, as also to said defendant, Holgate, and failed to do so; that his failure to sell arose

from representations of the complainant in this case, through her attorneys employed at Defiance, that he had no right to do so. She claimed, among other things, that the judgment obtained on the mortgage and notes of Weisenberger, through which title to the property had come to him, was unlawfully and fraudulently obtained, the said mortgage and notes being then in her own and children's possession, in which the said John B. Eaton had no rights.

14 And defendants further answering say, that finally the said John B. Eaton, becoming discouraged with the hope of making a sale, on or about the said 30th day of July, 1874, called upon defendant, Holgate, and representing his necessitous condition for money for the objects stated, requested said Holgate to loan him the sum of four hundred ($400.00) dollars, expressing a willingness to secure him on the land, and at the same time again urging said Holgate to purchase, claiming full right to manage and sell said property; said Holgate believing and trusting that said John B. Eaton had sufficient rights in said premises to secure the payment of the necessary monies to care for same, made said loan of said four hundred ($400.00) dollars, as requested, and received said warranty deed, executed by said John B. Eaton, as above stated, to secure the payment of same and any other advancements that said Holgate might make in the premises, with the condition, as expressed in said agreement, that said John B. Eaton was to forward on to be filed, according to law, the mortgage and notes on which the judgment was obtained under which he acquired his title to said premises; also another deed of said premises in which his said wife, the complainant herein, should join with him as grantor, which deed was substituted for said deed of said Eaton, executed as aforesaid, July 30th, 1874, and with the further condition said Holgate might have the option of holding said land as a purchaser by giving said John B. Eaton notice to that effect within sixty days.

15 Defendants aver that on or about October 1st, 1874, he gave said John B. Eaton notice he would hold said land as a purchase and carry out the letter and spirit of said contract, conditioned that said new deed, executed by said John B. Eaton and wife, be forwarded on, and all reasonable doubts and clouds of the title should be cleared up, excepting the Wilhelm tax title mentioned in said bill of complaint.

These defendants, further answering, say they believe the said John B. Eaton was ready and willing to faithfully perform his portion of said contract and to execute a new deed in pursuance to its terms, but they aver he was prevented from so doing by the refusal of his said wife, the complainant in this case, to join with him in its execution; that said deed of July 30th, 1874, was not procured to be recorded by said Holgate on the day of its execution, as alleged, but was held without being recorded until June the 8th, 1875, with the hope the said John B. Eaton might be enabled to induce his wife to join him in a proper deed for fulfillment of his said contract by the substitution of the said new deed as therein provided.

These defendants further answering say, that on said 8th day of June, 1875, being still desirous for the fulfillment of said contract

with the said John B. Eaton, and disposed to waive his laches in the premises, and thinking it would be satisfactory to him for us to do so, and so enable him to fulfil on his part, executed two notes of $1,500.00 each of the date of October 1st, 1874, making the same payable to the said Elizabeth R. Eaton, at the Defiance National Bank, with interest, payable annually, also a mortgage on
16 said land, as described in said bill of complaint to secure the same. That on said 8th day of June, 1875, they enclosed said notes in an envelope, together with a deed filled out ready for the signatures of the said John B. Eaton and the said Elizabeth R. Eaton, and directed and properly paid the postage and mailed the same to said Elizabeth R. Eaton, Fryeburg, Maine, upon condition that the deed so enclosed should be executed by the said John B. Eaton and the said Elizabeth R. Eaton and returned to these defendants, and that no right of property should rest in said Elizabeth R. Eaton in said notes and mortgage, except on the execution and return of said deed within a reasonable time thereafter. And they advised the said John B. Eaton of the mailing of said notes, mortgage, and deed to the address of the said Elizabeth R. Eaton, and of their wish for the proper execution of said deed as agreed, an acknowledgment of which was made to these defendants by said John B. Eaton, with statement that he had not *seen* or *heard* anything about them, though he did not doubt their receipt.

That on the 13th day of July, 1875, the said Elizabeth R. Eaton acknowledged by letter the receipt of said deed, notes, &c., mailed to her on said 8th day of June, stated and said in reference to said contract made by said John B. Eaton with the defendants it was decidedly against her will and wishes, that she was no party to it, felt under no obligations to signing the deed, and declined doing so.

These defendants aver said two $1,500.00 notes and mortgage to secure same, the foreclosure of which is asked in said bill, are
17 the same notes and mortgage enclosed with said deed upon the condition stated. And they aver the deed was not executed and returned pursuant to conditions and terms that justified the said Elizabeth R. Eaton in appropriating the said notes and mortgage to her use, and procuring the record of said mortgage, and that such appropriation and record, and attempt at foreclosure, is a fraud on their rights.

These defendants further answering say, that on the 15th day of June, 1875, they bought up the said tax title, with interest of the said Adam Wilhelm to said premises, as evidenced by a deed of the auditor of said Defiance county to said Wilhelm, recorded Dec. 17th, 1874, in vol. 23, pages 28, 29, and obtained from said Wilhelm and wife a quit-claim deed for said premises, for which they paid said Wilhelm the sum of $424.24.

These defendants say they patiently waited on the said John B. Eaton, during the ensuing summer and fall of 1875 and winter and spring of 1876, in vain hoping for the fulfilment of said contract on his part.

That about the spring of 1876, in a letter dated the 22nd of May, 1876, directed to the said Henry Newbegin, the said Elizabeth R.

Eaton made pretense that she had made a proposition, in April, 1876, through her son Rufus, the said next friend of the complainant, for a settlement on a basis of a return of the $400.00, with interest, loaned the said John B. Eaton, and as a consideration therefor that these defendants should relinquish all rights they had in said land, which she stated said Newbegin declined, and thereupon she proceeded to make a new proposition, to the effect that she would consent to deed the property to these defendants on condition
18 they would pay up said two $1,500.00 notes, with interest from their date, and in addition pay her the sum of two hundred dollars. In response to this letter and proposition, these defendants, on the 13th day of June, 1876, notified said complainant of their willingness to release their rights in said land on condition the said John B. Eaton would join in the arrangement, and that the money so as aforesaid paid out by these defendants on the property should be refunded, with interest. It was stated the exact amount they could not then tell, but would have it looked up if she (said complainant) wished; that there had been $400.00, or over, paid out to release the old tax title to said Wilhelm and other items.

These defendants further answering say, said complainant made no reply to this most equitable proposition for the adjustment of the matter; that the summer of 1876 passed without any action in the premises either by the said John B. Eaton or the said complainant. And defendants say they had fully determined, on said 13th day of June, 1876, that they would no longer waive the laches of the said John B. Eaton and said complainant in executing and returning to them the said deed that had been enclosed to said complainant, June the 8th, 1875, and would regard all said contracts and propositions indicating or relating to a purchase of said premises by them as henceforth being at an end, and would simply hold said property in security for said monies advanced upon the same, with proper interest, if peaceably adjusted within a reasonable time, or, in case of suit, to adjust the same for such damages and expenses in addition as a court should deem just.

19 These defendants aver the village of Defiance was rapidly growing in the neighborhood of said property in controversy during the years of 1874 and 1875, making an active demand for same for village purposes; that on account of the doubts resting upon the title by reason of the refusal of said complainant to join with said John B. Eaton in said deed to these defendants, they had been prevented from selling and profitably handling said property during said years, and so they had been greatly damaged, and irreparably so, in that the demand for said property for village purposes had entirely ceased during the year 1876.

These defendants, further answering, deny that said John B. Eaton fully and faithfully performed his portion of said contract or agreement.

They deny that, pursuant to the terms of said contract, after the 1st of October, 1874, at the request of said Holgate, a new deed of warranty of said lot or parcel of land was executed by said John B.

Eaton and his said wife, the complainant herein, and tendered to these defendants.

These defendants further deny that on or about October 1st, 1874, in pursuance to the terms of said agreement, they executed a mortgage to complainant on the premises described in said bill of complaint to secure the payment of said two $1,500 notes therein described. These defendants deny the delivery of said notes and mortgage to the said complainant, and deny her right to maintain a suit on the same.

They deny that on account of non-payment by defendants of said notes the estate of complainant became absolute at law in said mortgaged premises. And they deny that any sum is due said
20 complainant on said notes, either of principal or interest.

And further answering these defendants say, that since said 13th day of June, 1876, and long before the commencement of this suit, said John B. Eaton has withdrawn his consent to the payment of the amount of said notes to the complainant herein, and notified these answering defendants that he should require the balance of the proceeds of said lands to be paid to him.

These defendants further answering say, they have been ready and willing to release all their rights and interests in said premises in said contract described since said 13th day of June, 1876, to the said complainant, on the terms stated herein above, notice of which was given to complainant of that date. And defendants say they are now willing, on said terms stated, to release their rights in said premises.

These defendants further answering deny that said two notes of $1,500 each are the separate property of said complainant; and as to the real estate referred to, they say they are not fully advised of the nature and extent of complainant's rights in same. They say said real estate is an open common, without fences, and was so June 30th, 1874, and has continued so ever since, and cannot be made of profit except same is fenced. These defendants deny all other matters in said bill not fully answered or explained.

And these defendants deny all unlawful combination in said bill charged, without that any other matter or thing material for them to make answer to, and not herein sufficiently answered, avoided, or denied, is true, to the knowledge or belief of these defendants.

21 All which matters and things these defendants are ready to aver and prove as this court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM C. HOLGATE.
HENRY NEWBEGIN.

STATE OF OHIO, }
County of Defiance, } ss:

On this second day of March, before me, personally appeared the above-named Wm. C. Holgate and Henry Newbegin, and made oath that they have read the above bill subscribed by them and know

the contents thereof, and that the same is true of their own knowledge, except as to the matters which are therein stated to be on their information or belief, and that as to those matters they believe it to be true.

[SEAL.] JACOB I. GREEN,
Probate Judge of Defiance County, O.

HENRY NEWBEGIN.

Sworn to before me by the said William C. Holgate and Henry Newbegin, and in my presence by them severally subscribed, this 2nd day of March, A. D. 1878.

[SEAL.] HENRY B. HARRIS,
Notary Public.

And afterwards, to wit, on the 4th day of March, A. D. 1878, being a day of the January term, A. D. 1878, of said court, there was filed in this cause in this court the following cross-petition, being in the words and figures, to wit:

22 *Cross-Petition.*

United States Circuit Court, Northern District of Ohio. In Equity.

To the honorable the judges of the circuit court of the United States, within and for the norther district of Ohio:

William C. Holgate and Mary Newbegin, of the town and county of Defiance, in the State of Ohio, and citizens of said State and of said northern district of Ohio, bring this, their bill of complaint, against Elizabeth R. Eaton and John B. Eaton, of Fryeburg, in the State of Maine, and citizens of said State, both of whom your orators pray may be made party defendants to this bill of complaint.

Complaining showeth unto your honors that said Elizabeth R. Eaton, the defendant hereinafter named, on or about the fifth day of December, A. D. 1877, by her next friend, Rufus J. Eaton, of Hamilton, in the State of New York, a citizen of said State, filed her bill of complaint in this honorable court against your orators, thereby praying for process of subpœna against your orators, and that they may, on their corporal oaths, to the best of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters of said bill, and that an account may be taken under the direction and decree of this honorable court of what is due upon said mortgage and notes, and that your orators may be decreed to pay unto the said Elizabeth R. Eaton what shall thus appear to be due, with the costs of this suit, by an early day to be appointed by this honorable
23 court, and in default of such payment that said mortgaged premises may be sold, and the proceeds applied to the payment of the sum so found to be due unto the said Elizabeth R. Eaton, and that the balance, if any, after such payment, may be so applied as this honorable court shall direct, and that said Elizabeth R. Eaton may have such other and further relief in the premises as to your honors shall seem meet.

And your orators, being duly served with process of subpœna, appeared and put in their joint and several demurrer to part, and answer to the residue, of said bill of complaint of the said Elizabeth R. Eaton.

And your orators further showeth unto your honors that said cause has not yet been heard, and that said defendant, John B. Eaton, on about July 30th, A. D. 1874, went to said town of Defiance for the purpose of looking after the interests of said trust property in said original bill described; that the said John B. Eaton found same encumbered with judgments and tax liens, some of which were of so pressing a nature as to threaten great loss to said trust estate unless they should be released by prompt payment; that he endeavored to make sale of said property to divers parties in Defiance, and also to complainant, Holgate, to raise money to effect said object, but failing to make sale, requested said Holgate to loan him the sum of four hundred ($400.00) dollars, for said purpose of removing said liens, claiming full right to manage, sell, or encumber said property. Said Holgate believing and trusting that said John B. Eaton had sufficient rights in said premises to secure
the payment of the necessary monies to care for same, made
24 said loan of said four hundred ($400.00) dollars, as requested, and received said warranty deed executed by said John B. Eaton, as is in said original bill stated, to secure the payment of same, and any other advancements that said Holgate might thereafter make in the premises, with the condition as expressed in said agreement in said original bill set out; that said John B. Eaton was to forward on to be filed according to law the mortgage and notes on which the judgment was obtained, under which he acquired his title to said premises. Also another deed of said premises, in which his said wife, the complainant herein, should join with him as grantor, which deed was to be substituted for said deed of said Eaton, executed as aforesaid, July 30th, 1874. And with the further condition said Holgate might have the option of holding said land as a purchaser by giving said John B. Eaton notice to that effect within sixty days.

Your orators aver that afterwards said Holgate sold and conveyed to the said Newbegin the undivided one-half of all his rights and interests in said premises acquired by said deed, and his rights by virtue of said contract.

Your orators aver that on or about October 1st, 1874, said Holgate gave said John B. Eaton notice he would hold said land as a purchase, and carry out the letter and spirit of said contract, conditioned that said new deed executed by said John B. Eaton and wife be forwarded on, and all reasonable doubts and clouds of the title should be cleared up, excepting the Wilhelm tax title mentioned in said bill of complaint.

Your orators further state they believe the said John B.
25 Eaton was ready and willing to faithfully perform his portion of said contract, and to execute a new deed in pursuance to its terms; but they aver he was prevented from so doing by the refusal of his said wife, the complainant in said original bill, to join with him in

its execution. That said deed of July 30th, 1874, was not procured to be recorded by said Holgate on the day of its execution, as alleged, but was held without being recorded until June the 8th, 1875, with the hope the said John B. Eaton might be enabled to induce his wife to join him in a proper deed for fulfilment of his said contract, by the substitution of the said new deed, as therein provided.

Your orators further aver that on said 8th day of June, 1875, being still desirous for the fulfilment of said contract with the said John B. Eaton, and disposed to waive his laches in the premises, and thinking it would be satisfactory to him for them to do so, and so enable him to fulfil on his part, executed two notes of $1,500,00 each, of the date of October 1st, 1874, making the same payable to the said Elizabeth R. Eaton at the Defiance National Bank, with interest, payable annually; also a mortgage on said land, as described in said original bill of complaint, to secure the same. That on said 8th day of June, 1875, they enclosed said notes in an envelope, together with a deed filled out, ready for the signatures of the said John B. Eaton and the said Elizabeth R. Eaton, and directed and properly paid the postage and mailed the same to the said Elizabeth R. Eaton, Fryeburg, Maine, upon condition that the deed so enclosed should be executed by the said John B. Eaton and the said Elizabeth R. Eaton, and returned to your orators, and that no right of property should rest in said Elizabeth R. Eaton in said notes and mort-
26 gage, except on the execution and return of said deed within a reasonable time thereafter. And they advised the said John B. Eaton of the mailing of said notes, mortgage, and deed to the address of the said Elizabeth R. Eaton, and of their wish for the proper execution of said deed as agreed, an acknowledgement of which was made to your orators by said John B. Eaton, with statement that he had not *seen* nor heard anything about them, though he did not doubt their receipt.

That on the 13th day of July, 1875, the said Elizabeth R. Eaton acknowledged by letter the receipt of said deed, notes, &c., mailed to her on said 8th day of June, stated and said in reference to said contract made by said John B. Eaton with said orator, Holgate, it was decidedly against her will and wishes, that she was no party to it, felt under no obligations to signing the deed, and declined doing so.

Your orators aver said two $1,500,00 notes and mortgage to secure same, the foreclosure of which is asked in said bill, are the same notes and mortgage inclosed with said deed upon the condition aforesaid. And they aver that the deed was not executed and returned pursuant to the conditions on which the said $1,500,00 notes and mortgage to secure same was sent as aforesaid, and that the appropriation of the said notes and mortgage by the said Elizabeth R. Eaton was unauthorized, and that she had no right to procure same to be recorded, and has no right to foreclose the same.

Your orators further say that on the 15th day of June, 1875, they bought up the said tax title of the said Adam Wilhelm to said premises, as evidenced by a deed of the auditor of said Defiance county to said Wilhelm, recorded Dec. 17th, 1874, in vol. 23,

27 pages 28, 29, and obtained from said Wilhelm and wife a quit-claim deed for said premises, for which they paid said Wilhelm the sum of $424.24.

Your orators say they patiently waited on the said John B. Eaton, during the ensuing summer and fall of 1875 and winter and spring of 1876, in vain hoping for the fulfillment of said contract on his part.

That about the spring of 1876, in a letter dated the 22nd of May, 1876, directed to the said Henry Newbegin, the said Elizabeth R. Eaton made pretense that she had made a proposition in April, 1876, through her son Rufus, the said next friend of the complainant, for a settlement on a basis of a return of the $400.00, with interest, loaned the said John B. Eaton, and as a consideration therefor that your orators should relinquish all rights they had in said land, which she stated said Newbegin declined, and thereupon she proceeded to make a new proposition to the effect that she would consent to deed the property to our orators on conditions they would pay up said two $1,500.00 notes, with interest from their date, and in addition pay her the sum of two hundred dollars.

In response to this letter and proposition, your orators, on the 13th day of June, 1876, notified said complainant of their willingness to release their rights in said land on condition the said John B. Eaton would join in the arrangement, and that the money so as aforesaid paid out by your orators on the property should be refunded, with interest. It was stated the exact amount they could not then tell, but would have it looked up if said Elizabeth R. Eaton wished; that there had been $400.00 or over paid out to release the old tax title to said Wilhelm and other items.

28 Your orators further say said Elizabeth R. Eaton made no reply to this most equitable proposition for the adjustment of the matter; that the summer of 1876 passed without any action in the premises either by the said John B. Eaton or the said Elizabeth R. Eaton. And your orators say they had fully determined, on said 13th day of June, 1876, that they would no longer waive the laches of the said John B. Eaton and said Elizabeth R. Eaton in executing and returning to them the said deed that had been enclosed to said Elizabeth R. Eaton June 8th, 1875, and would regard all said contracts and propositions indicating or relating to a purchase of said premises by them as henceforth being at an end, and would simply hold said property in security for said monies advanced upon the same, with proper interest, if peaceably adjusted within a reasonable time.

Your orators further say that said John B. Eaton did not perform his portion of said contract or agreement; that he did not make and execute said new deed of conveyance, and have his wife join him in the execution of the same as grantor, as provided by said contract, and failed to file said notes and mortgage as so provided.

Your orators further say that the said two $1,500.00 notes in said original bill set out, and the said mortgage executed by your orators to secure the same in said bill described, were never delivered to said Elizabeth R. Eaton by your orators, and they aver said Elizabeth R.

Eaton has no right to maintain a suit upon the same; and that your orators have the right to the possession and control of same.

29 Your orators further aver that since the said 13th day of June, and long before the commencement of this suit, the said John B. Eaton has withdrawn his consent to the payment of the amount of said notes to the said Elizabeth R. Eaton, and notified your orators that he should require the balance of the proceeds of said lands to be paid to him. Your orators further say they have been at all times ready and willing, since said 13th day of June, 1876, to release all their rights and interests in said premises in said deed of the said John B. Eaton and contract described as set out in said original bill to the said Elizabeth R. Eaton, if the said John B. Eaton should assent to such release, on the terms of repayment to them of the monies and interest expended by them, as is hereinbefore stated, and the redelivery to them of said two $1,500.00 notes and the mortgage, properly cancelled, of all which notice was given to the said Elizabeth R. Eaton of that date. And your orators say they are now ready and willing, on said terms and conditions stated, to release their rights in said premises, and herewith they bring into court here a deed of release for that purpose, to be delivered to such person as the court may order and direct.

Your orators aver said real estate is in open common, without fences, and was so June 30th, 1874, and has continued so ever since, and cannot be made of profit except same is fenced; and that they are not fully advised as to the full nature and extent of the said Elizabeth R. Eaton's rights in same.

Your orators further aver that neither the said four hundred dollars loaned as aforesaid to the said John B. Eaton June 30th, 1874, nor the said four hundred and twenty-four dollars and twenty-

30 four cents paid to the *the* said Adam Wilhelm June 15th, 1875, for his said tax title on said premises, or any part thereof have been paid to your orators, or to either of them; and that said two sums, with a large amount of interest thereon, are now due to your orators, secured, as shown on said premises; and your orators have requested payment of the same of the said John B. Eaton and of the said Elizabeth R. Eaton, at the same time offering on such payment being made to release all their interests in said premises to the said John B. Eaton, or to the said Elizabeth R. Eaton in case the said John B. Eaton would assent and agree thereto; which said payments said John B. Eaton and said Elizabeth R. Eaton have neglected and refused to make.

Your orators therefore pray that said defendants may upon their corporal oaths full and true answers make to all and singular the matters aforesaid, and that an account be taken under the direction and decree of this court of what is due your orators for monies paid out as aforesaid on said premises, and that the said John B. Eaton, or the said Elizabeth R. Eaton be decreed to pay unto your orators said amount so found due them, with costs of this suit, by a day to be named by this court; and in default of such payment that said premises described in said deed, executed by the said John B. Eaton to your orator, and said contract set out in the original bill, subject

to proper exceptions as shown herein, be sold, and that the proceeds be applied to the payment of the sums so found due your orators, and the costs and taxes on said premises, and that the balance, if any, after such payment, may be so applied as this court shall
31 direct. And your orators further pray that the said Elizabeth R. Eaton, and her attornies, counsellors, and agents, may be restrained by an injunction issuing out of this court from proceeding further against your orators in the said suit instituted by said original bill in this case; and that they be ordered, directed, and decreed to deliver up to your orators said two $1,500.00 notes and mortgage and contract properly cancelled; and in default of so doing, that they and the said John B. Eaton be perpetually enjoined from collecting, or attempting to collect, and from selling or disposing of same, and that your orators have generally such other and further relief as the nature of the case may require.

Therefore, will your honors grant unto your orators that this, their suit, may be heard at the same time the suit on the original bill in this case is heard; and also grant that the writ of subpœna issuing out of and under the seal of this court be directed to said defendants, Elizabeth R. Eaton and John B. Eaton, commanding them, and each of them, by a certain day and under a certain penalty therein inserted, to appear before your honors in the circuit court of the northern district of Ohio, and then and there answer the premises and abide the order and decree of the court.

WM. C. HOLGATE,
HENRY NEWBEGIN,
By ALEXANDER S. LATTY,
Their Solicitor.

THE STATE OF OHIO, }
Defiance County, } *ss:*

On this second day of March, before me, personally appeared the above-named William C. Holgate and Henry Newbegin,
32 and made oath that they have read the above bill subscribed by them and know the contents thereof, and that the same is true of their own knowledge, except as to the matters which are therein stated to be on their information and belief, and that as to those matters they believe it to be true.

JACOB I. GREEN,
Probate Judge of Defiance County, Ohio.

And afterwards, to wit, on the 13th day of March, A. D. 1878, being a day of the January term of said court, A. D. 1878, the following subpœna was filed in this cause in this court, being in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, }
Northern District of Ohio, } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Elizabeth R. Eaton and

John B. Eaton, if they be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in April next, to answer a certain cross-bill, in chancery, filed and exhibited in said court against them by William C. Holgate and Henry Newbegin.

Hereof they are not to fail, under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 4th day of March, A. D. 1878, and in the
33 102nd year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk.*
By GEO. WYMAN, *Deputy Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court, on or before the first Monday of April, 1878, otherwise the said bill may be taken *pro confesso.*

EARL BILL, *Clerk.*

Returned not served, neither of the within-named persons found, nor have they a residence in this district.

N. B. PRENTICE,
U. S. Marshal.

Appearance.

And afterwards, to wit, on the 29th day of March, 1878, the following appearance was entered in the order book:

ELIZABETH R. EATON *vs.* WM. C. HOLGATE *et al.*

The appearance of the defendant, John B. Eaton, in this suit is hereby entered.

HENRY NEWBEGIN,
Solicitor.

Continuance.

And afterwards, to wit, on the 30th day of March, A. D. 1878, being a day of the January term, A. D. 1878, of said court, this cause is continued to the next term of said court.

Order.

And afterwards, to wit, on Monday, the 6th day of May,
34 A. D. 1878, being a day of the April term, A. D. 1878, of said court, the following order was entered in this cause in this court. Present, the Hon. Martin Welker, district judge, &c.:

In this cause it is ordered that leave be granted to John B. Eaton to file his answer to the answer and cross-petition of Holgate and Newbegin by the 3d day of June, 1878.

And afterwards, to wit, on the 23d day of April, A. D. 1878, the following answer to cross-petition was filed in this cause in this court, being as follows, to wit:

Answer of Elizabeth R. Eaton.

United States Circuit Court, Northern District of Ohio. In Equity, No. 3549.

To the honorable the judges of said court:

The answer of Elizabeth R. Eaton to the cross-petition of William C. Holgate and Henry Newbegin, filed against her in the case in equity, wherein she, by her next friend, is complainant, and said Holgate and Newbegin are defendants.

And this defendant, now and at all times hereafter saving to herself all and all manner of benefit of exceptions to the many errors, uncertainties, and imperfections in said cross-bill contained, for answer thereto, or to so much thereof as this defendant to said cross-petion is advised it is material or necessary for her to answer, answering, saith:

That she admits the bringing and pendency of the suit in
35 equity by her next friend, as set up in said cross-petition, but she avers that since the bringing of the same she has obtained a decree of divorce from the said John B. Eaton, her former husband, by a valid decree against him by a court having jurisdiction in the State of Maine, which is in full force, and that said John B. Eaton has, by a valid and sufficient deed and instrument in writing, dated January 2d, 1878, conveyed and relinquished to her any and all interest he may have had or claimed to have in the real estate described in said orignal bill filed by her and referred to in said cross-petition, so that the said John B. Eaton has and can claim no interest in the same.

And this defendant further answering says, that as to the averments in said cross-bill relating to negotiations for the sale of said real estate and the loaning of money to said John B. Eaton, and as to all other matters not contained in the written documents set forth in said original bill, this defendant has no knowledge or information sufficient to form a belief, and she therefore denies the truth of each and every of said averments.

This defendant admits that the deed of the said John B. was withheld from record, and was recorded June 8th, 1875, but with what motive this defendant is ignorant, and therefore denies the allegations in said cross-bill in relation thereto.

This defendant further answering admits that the notes and mortgage were executed as alleged, and delivered to this defendant, but this defendant avers, as set up in her original bill, that she is the sole and absolute owner of said notes and mortgage and her good right to enforce and collect the same against the makers
36 thereof and against said mortgaged premises.

This defendant further answering says, that as to the averments relating to said tax title she has no knowledge sufficient to enable her to admit, and she therefore denies the truth thereof, avering that if said tax title was purchased in, the purchaser acquired no rights thereunder adverse to the rights of this complainant, the said purchase having been made to protect the purchaser's own title.

And this defendant further answering says, that as to all alleged matters of pretence and propositions, and letters and communications of any kind between said parties or any of them, and as to the purposes and determinations of said Holgate and Newbegin, the same are so far untruly pleaded that this defendant denies the averments respectively touching the same, leaving the complainants in said cross-petition to produce such proof thereof as they may be able to obtain.

This defendant further answering alleges, as she avered in her original petition, that a joint deed was executed and tendered to said Holgate and Newbegin; that as to whether said John B. Eaton has withdrawn his consent to payment to this defendant, or notified said complainant to pay to him, this defendant avering the same to be immaterial, denies the averments in said cross-bill in relation thereto.

This defendant further answering says, that as to the averments of willingness and offers to reconvey said premises, as the same are alleged in said cross-bill, and as to the character and condition of said premises, this defendant has no knowledge, and therefore denies the same; but this defendant avers that said alleged loan of
37 money, and the amount alleged to have been paid for said tax redemption, are not liens on said premises, but were fully settled and accounted for in the purchase of said land by said complainants in said cross-bill.

This defendant further answering, says as to all the other matters in said cross-bill contained, which she is advised are material or necessary to be answered, that except so far as they are herein admitted or are set forth in said original bill, and in so far as they are inconsistent with the averments of said original bill, this defendant denies the truth thereof.

And this defendant further answering says, that the said original bill is true, and entitles her to the relief therein prayed for, but that said cross-bill is without equity as against this defendant, and she therefore prays that the same may be dismissed with costs.

WILLEY, SHERMAN & HOYT,
Solicitors for Defendant.

NORTHERN DISTRICT OF OHIO, } ss:
Cuyahoga County, }

On this 23rd of April, 1878, before me, George Willey deposes and says that he is one of the solicitors for said defendant, Elizabeth R. Eaton, who, with her son and next friend named in said original bill, are absent from and non-residents of the State of Ohio; that he has read the foregoing answer, and knows the contents thereof; that the statements contained therein are true in substance and fact, except so far as the same are stated to be on the information of others, and as to that they are true to the best of his knowledge and belief.

GEO. WILLEY.

Subscribed and sworn to before me, this 23rd April, 1878.

CHAS. BALFOUR,
Notary Public.

38 *Replication.*

And afterwards, to wit, on the 23rd day of April, A. D. 1878, being a day of the April term, A. D. 1878, of said court, the following reply was filed in this cause in this court, to wit:

Circuit Court of the United States, Northern District of Ohio.

ELIZABETH R. EATON, by her next friend, &c., *vs.* WILLIAM C. HOLGATE *et al.* } In Chancery. No. 3549.

The replication of Elizabeth R. Eaton, complainant, by her next friend, to the answer of William C. Holgate and Henry Newbegin, defendants, the said complainant reserving to herself all and all manner of exception to the manifold insufficiencies of said answer, for replication thereto, says:

That she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by this complainant, without this, that any other matter or thing whatsoever in the said answer contained material to be replied unto, confessed, and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and prays, as in her said bill she has already praved.

WILLEY, SHERMAN & HOYT,
Sol's for Complainant.

39 *Exceptions to Answer.*

And afterwards, to wit, on the 12th day of June, A. D. 1878, the following exceptions to answer of Elizabeth R. Eaton to the cross-bill was filed in this cause in this court, to wit:

United States Circuit Court, Northern District of Ohio. In Equity.

WILLIAM C. HOLGATE and HENRY NEWBEGIN *vs.* ELIZABETH R. EATON and JOHN B. EATON. } Cross-Bill.

An exception taken by the said complainants to the insufficient answer of the said defendant, Elizabeth R. Eaton, to the said complainant's cross-bill.

First. For that the said defendant has not, to the best of her knowledge, remembrance, information, and belief, answered and set forth whether or not she informed the complainant, as alleged in said cross-bill, by letter of July 13th, 1875, that said contract between said John B. Eaton and complainant was made without her knowledge or authority, and that she was no party to it, and not bound by it, but her answer to said allegation in said cross-bill is evasive and insufficient.

Second. For that the said defendant, Elizabeth R. Eaton, hath not in manner aforesaid answered and set forth whether or not the com-

plainant, as alleged in said cross-bill at the time that complainants forwarded to said defendant the notes sued on in the original
40 bill herein, and the mortgage securing the same, to wit, June 8th, 1875, they did not inform her by letter enclosed therewith that said notes and mortgage were delivered to her conditionally, no right in the same to vest in her until she should, with said John B. Eaton, sign the deed enclosed in the same envelop and return the same to the complainants, but her answer to said allegations in said cross-bill is evasive and insufficient.

In which particulars the said complainants except to the answer of said defendant, Elizabeth R. Eaton, as evasive, imperfect, and insufficient, and humbly pray that the said Elizabeth R. Eaton may be compelled to put in a full and sufficient answer to said cross-bill.

BOLTON & TERRELL,
Solicitors for Complainants.

Continuance.

And afterwards, to wit, on the 30th day of September, being a day of the April term, A. D. 1878, of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 3d day of January, A. D. 1879, being a day of the October term, A. D. 1878, of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 31st day of March, A. D. 1879, being a day of the January term, A. D. 1879, of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 7th day of May, A. D. 1879, the following bill of revivor was filed in this cause in this court, being in the words and figures following, to wit:

41 *Bill of Revivor.*

In the Circuit Court of the United States for the Northern District of Ohio. In Equity.

To the honorable the judges of the circuit court of the United States, within and for the northern district of Ohio:

Rufus J. Eaton, of the city of Cleveland, county of Cuyahoga, and State of Ohio, a citizen of said State and of the northern district thereof, brings this his bill of revivor against William C. Holgate and Henry Newbegin, of the town and county of Defiance, in the State of Ohio, and citizens of said State and of said northern district of Ohio.

And your orator further shows unto your honors that on or about the 5th day of December, A. D. 1877, your orator, then of the city of Hamilton, State of New York, a citizen of said State, as the next friend of one Elizabeth R. Eaton, of Fryeburg, in the State of Maine, and a citizen of said State, exhibited his certain bill of complaint in this court against the said H. C. Holgate and Henry Newbegin,

then as now citizens of said State and district, setting forth among other things, that the said defendants had executed and delivered unto the said Elizabeth R. Eaton this mortgage deed upon certain premises in said bill described, to secure the payment of two certain promissory notes given by the said Holgate and Newbegin to the said Elizabeth R. Eaton; that said notes were due and unpaid, and that thereby the conditions of said deed had been broken, and that said deed had become absolute, and praying your honors for
42 a foreclosure of said mortgage and sale of said mortgaged premises.

And your orator further shows unto your honors that afterwards, to wit, on or about the 14th day of December, A. D. 1877, said original bill was, by the leave of this honorable court, first had and obtained, amended and refiled in said court.

Your orator further shows unto your honors that process was duly served on said defendants, and that they duly entered their appearance in said cause and filed a joint and several answer to said bill.

And your orator further shows unto your honors that afterwards, to wit, on or about the 10th day of October, A. D. 1878, the said Elizabeth R. Eaton departed this life before said cause came on for a hearing before this honorable court, and that on the 7th day of May, A. D. 1879, your orator, the said Rufus I. Eaton, was duly appointed and qualified as administrator of the estate of the said Elizabeth R. Eaton by the probate court in and for the county of Cuyahoga, in the State of Ohio, as appears more fully and at large by a duly authenticated exemplification of said proceeding from the records of said probate court of said county, hereto annexed and marked "Exhibit A."

And your orator further shows unto your honors that the said suit, which is entitled as of No. 3549 in this court, has become abated by the death of the said Elizabeth R. Eaton, and that your orator is, as he is advised, as administrator as aforesaid, entitled to have the said suit revived against the said defendants and prosecuted and carried on in the name of your orator, as such administaator, and for
43 the benefit of the heirs of the said Elizabeth R. Eaton, and to have the said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of the said Elizabeth R. Eaton.

And your orator in this, his bill of revivor, avers and alleges each and every allegation and averment as in said original bill and amended bill in said cause filed averred and alleged.

To the end, therefore, that the said defendant may answer the premises, and that the said suit and proceedings which so became abated as aforesaid may stand revived, and be in the same state and condition as the same were in at the time of the death of the said Elizabeth R. Eaton, or that the said defendants may show good cause to the contrary, may it please your honors to grant unto your orator writs of subpœna to revive, issuing out of and under the seal of this honorable court, to be directed to the said William C. Holgate and Henry Newbegin, thereby commanding them at a certain day and under a certain penalty, to be therein limited, personally to

be and appear before your honors in this honorable court, then and there to show cause, if they can, why the said suit and the proceedings therein had should not stand and be revived against them, and be in the same plight and condition as the same were in at the time of the abatement thereof; and further to stand to and to abide such order and decree in the premises as to your honors shall seem meet.

And your orator will ever pray, etc.

RUFUS I. EATON,
As Administrator of the Estate of Elizabeth R. Eaton, deceased.

WILLEY, SHERMAN & HOYT,
Sol's for Complainant.

44 "EXHIBIT A."

THE STATE OF OHIO, } In the Probate Court.
Cuyahoga County. }

I, Daniel R. Tilden, judge of the probate court within and for said county, in the State aforesaid, do hereby certify and make known, that on the seventh day of May, anno Domini 1879, letters of administration on the estate of Elizabeth R. Eaton, deceased, were granted unto Rufus I. Eaton, and the same are now in full force and effect.

In testimony whereof, I have hereunto set my hand and affixed the seal of said probate court, at Cleveland, in said county, this 7th day of May, anno Domini 1879.

[SEAL.] DANIEL R. TILDEN,
Probate Judge.

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio. }

Before me, a notary public within and for the county of Cuyahoga, and State of Ohio, personally appeared the said R. I. Eaton, and having been duly sworn, deposes and says, that he has read or heard read the foregoing bill of revivor, and that the facts set forth in said bill so far as they are of his own knowledge are true, and so far as they are stated on knowledge derived from others he believes them to be true.

R. I. EATON.

Sworn to and subscribed in my presence, this 7th day of May, A. D. 1879.

[SEAL.] CHARLES BALFOUR,
Notary Public.

Tax fees, 40c.

45 *Entry of Appearance of Defendants.*

And afterwards, to wit, on the 19th day of May, A. D. 1879, the following entry of appearance was filed in this cause in this court, to wit:

ELIZABETH R. EATON, &c., *vs.* WILLIAM C. HOLGATE *et al.*

The appearance of William C. Holgate and Henry Newbegin, defendants in this case is hereby entered.

Order Sustaining Exceptions, &c.

And afterwards, to wit, on Tuesday, the 30th day of September, A. D. 1879, being a day of the April term, A. D. 1879, of said court, before the Hon. John Baxter, circuit judge, &c., and the Hon. Martin Welker, district judge, &c., this cause *cause* came on for hearing upon the exceptions to the answer of Elizabeth R. Eaton to the answer and cross-petition of defendants, and thereupon by agreement of parties, it is ordered that said exceptions be sustained, and leave is given said complainant, Elizabeth R. Eaton, to amend her answer in thirty days.

Continuance.

And afterwards, to wit, on the 6th day of October, 1879, being a day of the April term, A. D. 1879, of said court, this cause was continued to the next term of said court.

46 And afterwards, to wit, on the 5th day of January, A. D. 1880, being a day of the October term, A. D. 1879, of said court; this cause was continued to the next term of said court.

And afterwards, to wit, on the 5th day of April, A. D. 1880, being a day of the January term, A. D. 1880, of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 9th day of July, A. D. 1880, being a day of the April term of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 3d day of January, A. D. 1881, being a day of the October term, A. D. 1880, of said court, this cause was continued to the next term of said court.

Journal Entry Referring Cause to Master.

And afterwards, to wit, on Wednesday, the 19th day of January, A. D. 1881, being a day of the January term, A. D. 1881, of said cause. Present, the Hon. Martin Welker, district judge, &c. By consent of the parties this cause is referred to J. D. Cleveland, Esq., to take the testimony and report to this court as to the issues joined.

And afterwards, to wit, on Saturday, the 19th day of February, being a day of the January term, A. D. 1881, of said court. Present, the Hon. Martin Welker, district judge, &c. In this cause leave is given to file a supplemental bill instanter.

47 And afterwards, to wit, on the 19th day of February, being a day of the January term, A. D. 1881, the following supple-

mental bill was filed in this cause in this court, being in the words and figures following, to wit:

Supplemental Bill.

United States Circuit Court, Northern District of Ohio.

R. J. EATON, Administrator, etc., Complainant, *vs.* W. C. HOLGATE *et al.*, Defendant.	No. 3549. In Chancery. Supplemental Bill.

The honorable the judges of the circuit court of the United States within and for the northern district of Ohio:

And now comes Rufus I. Eaton, administrator, etc., complainant, and by leave of court first had and obtained, files this his supplemental bill in this cause and alleges—

That since the death of the said Elizabeth R. Eaton, John B. Eaton, Alonzo L. Eaton, C. Lewis Eaton, and Horace A. Eaton, sons of the said Elizabeth, have or claim to have some interest in the mortgage and notes in said original bill set forth and the premises therein described, of the nature and extent of which your orator is not fully advised. Wherefore your orator prays that the said John B. Eaton, Alonzo L. Eaton, C. Lewis Eaton, and Horace A. Eaton may be made parties defendant in said cause, and that process of sub-
48 poena may be issued against them, and that they may, upon their corporal oaths, to the best of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to all and singular the matters aforesaid, and may be required to set out fully the interest or interests which they have, or claim to have, in said premises and in said mortgages and notes, and for the relief prayed for in said original bill and said bill of revivor, and for such other and further relief as to this court shall seem meet.

R. I. EATON, *Administrator, etc.*
By WILLEY, SHERMAN & HOYT,
His Solicitors.

WILLEY, SHERMAN & HOYT,
Sols. for Complainant.

UNITED STATES OF AMERICA, *Northern District of Ohio:*

Before me, a notary public within and for the county of Cuyahoga, and State of Ohio, personally appeared the said R. I. Eaton, administrator, etc., and having been duly sworn, deposes and says that he has read the foregoing supplemental bill, and that the averments therein contained, so far as they are of his own knowledge, are true, and so far as they are stated on knowledge derived from others he believes them to be true.

RUFUS I. EATON.

Sworn to and subscribed in my presence, this 18th day of February, A. D. 1881.

[SEAL.] CHARLES BALFOUR,
Notary Public.

Entry of Appearance.

Now come the said John B. Eaton, Alonzo L. Eaton, C. Lewis Eaton, and Horace A. Eaton, by Willey, Sherman and Hoyt,
49 their duly authorized attorneys in the premises, and hereby enter their appearance in said cause, waiving all issuing and service of prossess herein.

JOHN B. EATON,
ALONZO L. EATON,
C. LEWIS EATON,
HORACE A. EATON,
By WILLEY, SHERMAN AND HOYT,
Their Solicitors.

Joint Answer of Defendants, John, Alonzo, Lewis, and Horace Eaton.

And afterwards, to wit, on the 19th day of February, A. D. 1881, being a day of the January term, A. D. 1881, of said court, the following joint answer of defendants, John, Lewis, Alonzo, and Horace Eaton was filed in this cause in this court, to wit:

In the Circuit Court of the United States, Northern District of Ohio.

R. I. EATON, Administrator, etc., Complainant, *vs.* W. C. HOLGATE *et al.*, Defendants.	No. 3549. In Chancery. Joint answer of John Eaton, Alonzo Eaton, Lewis Eaton, and Horace Eaton, Defendants.

The joint answer of John Eaton, Alonzo Eaton, Lewis Eaton, and Horace Eaton, defendants, of the city of Union, county of Union, State of Oregon, and citizens of said State to the original bill as amended, the bill of revivor and supplemental bill in said cause filed.

50 These defendants answering unto the same or to so much thereof as they are advised it is material or necessary for them to make answer unto, answering, say:

That one William A. Allen, late of the town of Loreland, State of Ohio, on or about the 1st day of February, 1861, died, and left a will, which said will was duly admitted to probate in the probate court of Clarmont county, State of Ohio; that the said Allen was in his lifetime the full brother of the said Elizabeth R. Eaton, since deceased, and that in and by the will aforesaid he, the said Allen, bequeathed to the said Elizabeth R. Eaton the one-half of all the remainder of his estate, after paying certain legacies and all expenses incident to the settlement of his said estate, in her own right, during her natural life, and at her death to be equally divided amongst her five children, as follows: To her son John, one-fifth part; to her son Alonzo, one-fifth part; to her son Rufus, one-fifth part; to her son Lewis, one-fifth part; and to her son Horace, one-fifth part; and that if either of said sons of the said Elizabeth R. Eaton should die before their mother, or without issue, then the

survivors to have his part or share, and these defendants admit that the said Elizabeth R. Eaton departed this life at the time alleged in said bill of revivor.

And defendants further answering say, that they, the said defendants, together with the said Rufus I. Eaton, complainant, are the five sons of the said Elizabeth R. Eaton, to whom said bequest was made in said will as aforesaid, and that all of said sons are now living.

51 And further answering these defendants say, that said mortgage and notes set up in said original bill in said cause filed are a portion of the estate of the said William A. Allen, so bequeathed as aforesaid to the said Elizabeth R. Eaton in her own right during her natural life, and at her death to her said five sons, these defendants, and the said R. I. Eaton, complainant. And defendants further say that by the death of the said Elizabeth R. Eaton said mortgage and notes passed into the hands of said R. I. Eaton as administrator of the estate of the said Elizabeth R. Eaton, deceased, said administrator claiming the same as assets of said estate. But defendants aver that by reason of the said will of the said Allen these defendants, together with the said R. I. Eaton, became and are the owners of said mortgage and notes, subject only to the interest which the said estate of the said Elizabeth R. Eaton has in the same.

Whereupon these defendants pray that said mortgage, as in said original bill prayed, may be foreclosed; that said premises therein described may be sold; that the rights of these defendants and of said estate in said mortgage and notes may be determined by this honorable court; that an account may be taken of the amount due these defendants, and said estate respectively, and said amount so found to be due these defendants may be ordered paid them out of the proceeds of said sale, after the payment of the amount so found due the estate of the said Elizabeth R. Eaton, and these defendants pray for such other and further relief as to this court may seem meet and proper in the premises.

JOHN B. EATON,
ALONZO L. EATON,
C. LEWIS EATON,
HORACE A. EATON,
Defendants.

52 By WILLEY, SHERMAN & HOYT,
Their Solicitors.

WILLEY, SHERMAN & HOYT,
Solicitors for said Defendants.

UNITED STATES OF AMERICA, *Northern District of Ohio:*

James H. Hoyt, being duly sworn before me, a notary public within and for Cuyahoga county, State of Ohio, says that he is one of the solicitors of said defendants, duly authorized in the premises; that said defendants are each and all of them non-residents of the State and northern district of Ohio, and are now absent therefrom;

that the averments in the foregoing answer contained are true, as he believes.

JAMES H. HOYT.

Sworn to and subscribed before me, by the said James H. Hoyt, at Cleveland, Ohio, this 18th day of February, A. D. 1881.

[SEAL.] CHARLES BALFOUR,
Notary Public.

Continuance.

And afterwards, to wit, on the 4th day of April, A. D. 1881, being a day of the January term, A. D. 1881, of said court, this cause was continued to the next term of said court.

And afterwards, to wit, on the 29th day of December, A. D. 1881, being a day of the April term, A. D. 1881, of said court, this cause was continued to the next term of said court.

53 *Report of Referee.*

And afterwards, to wit, on the 6th day of January, A. D. 1882, the following report was filed in this cause in this court, being in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio.

RUFUS I. EATON, Administrator, &c.,
vs.
WILLIAM C. HOLGATE and HENRY NEWBEGIN.

To the honorable judges of the United States circuit court:

The undersigned, to whom was referred the above-entitled cause to examine and report upon the issues of law, respectfully submit the following report:

Notice having been duly given to the counsel of the respective parties that the hearing of the case would take place on the 25th day of February, 1881, the attorneys of the parties appeared, and the examinations of witnesses was had herein from day to day until the 30th day of June, 1881, when the testimony closed—the testimony taken by a stenographer under the direction of the referee, being reduced to writing, and, with the exhibits, herewith returned as part of this report.

The bill in this case was filed by Elizabeth R. Eaton, a married woman, by her next friend, Rufus I. Eaton, against William C. Holgate and Henry Newbegin, of Defiance, Ohio, to foreclose mortgage executed Oct. 1st, 1874, by defendants, on lands in Defiance, to secure two notes of same date given by defendants for $1,500 each, and payable to Elizabeth R. Eaton in one and two years respectively, made payable at Defiance, Ohio, she, complainant, having
54 died Oct. 10th, 1878; the suit was revived by her administrator, and her heirs made parties to the proceeding.

The defendants deny the right of complainant to recover the amount of the notes and to have enforcement of the mortgage, on

the ground that they were made by defendants and sent to the complainant, Elizabeth R. Eaton, to take effect conditionally upon the performance of certain acts relating to the title of the lands, and particularly upon the execution and delivery to defendants of a deed by her and her husband of the lands in question, claiming that such deed was not so made and delivered, or if so delivered, not in a reasonable time; that the agreement of purchase was not fulfilled by complainants, and that the notes and mortgage are void obligations.

It appears that by the will of William A. Allen, brother of Elizabeth R. Eaton, a share of his estate was given to her. Bartley Campbell, of Cincinnati, her agent, seems to have had possession of this share of the estate, being personal property, and used it as his own. In accounting for the same, he assigned a mortgage which he held on lands in Defiance to John B. Eaton, her husband, in trust for Mrs. Eaton and her children. This mortgage was foreclosed under proceedings at Defiance, in which John B. Eaton appeared to be the only party in interest, and at the sheriff's sale he became the purchaser, and the sheriff's deed was made to him, of about 95 acres of land in Defiance.

July 30th, 1874, John B. Eaton, thus holding the legal title to this land, sold the same to the defendant, William C. Holgate, for $6,000 and the amount necessary to take up a tax claim held by Adam Wilhelm.

55 The sale was evidenced by a contract written and signed by the parties, by which it was stipulated that $1,000 was to be paid Oct. 1, 1874, $2,000 in six months thereafter, $1,500 in one year, and $1,500 in two years, with interest after Oct. 1st, 1874. Simultaneously with the making of the contract Eaton executed and delivered a deed of the land to Holgate.

By the contract it was agreed that Eaton was to execute an additional deed of warranty, his wife joining with him, and to forward the same after her return to Maine, together with the mortgage and notes on which judgment had been taken, under which the sheriff's sale had taken place, if these papers could be found.

The contract further provided that if, on or before Oct. 1st, 1874, Holgate should prefer not to hold the premises on the terms of the contract, Eaton should repurchase same of him and release Holgate from his obligation to pay as above, and would repay Holgate the $400 advanced on the first installment, becoming due Oct. 1, 1874, for which repayment Holgate might hold title as security.

If, however, Holgate should be satisfied with his purchase, he should execute and deliver notes for the unpaid instalments, any amounts realized from railroads to be credited on the $6,000. Holgate assigned half of his interest in the contract to Henry Newbegin, agreeing to convey an undivided half of the lands to him on condition of his paying half of the purchase money, and a deed was afterwards made by Holgate to Newbegin in accordance with this agreement. Newbegin was Eaton's attorney at this time, and proceedings being had to condemn for railroad purposes about thirteen acres of the land, upon Elizabeth R. Eaton's interposing a

claim for the proceeds, the court decided that these proceeds, amounting to $2,600, belonged to and were payable to John B. Eaton. On or about Oct. 1, 1874, Holgate exercised the option
56 which he had reserved in the contract by deciding to keep the lands.

It is conceded that at the time of the purchase and contract Holgate had no knowledge of any interest which Mrs. Eaton could claim in the proceeds of the sale or in the lands, except for dower.

Some difficulty being found by J. B. Eaton in obtaining his wife's signature to a deed, he assented to the balance of the purchase money being paid to her.

Accordingly, in June, 1875, two notes and mortgage of the lands thus purchased, excluding the lands appropriated by the railroad Co., were executed by defendants, Holgate and Newbegin, bearing date Oct. 1, 1874, for $1,500 each, payable to Elizabeth R. Eaton, with interest annually. These notes and mortgage are those upon which this suit is brought. They were sent to Mrs. Eaton and with them a deed of the lands, to be signed by John B. Eaton and wife, from which the lands were excepted, to which the Baltimore, Pittsburg, and Chicago railway had acquired rights and title. This was June 8th, 1875. The court, it appears, had not decided the controversy between J. B. Eaton and his wife as to the proceeds of the railroad appropriation. July 6, 1875, Mr. Newbegin writes to Mrs. Eaton, "Whether you take this money or not (referring to the mor-gage notes payable to her) Mr. Holgate can hold the land. He has a deed conveying it from Mr. Eaton, which, beyond all question, gives him title, in my opinion, for two reasons: 1st. It was a personal trust, and the deed conveyed good title, and for this money you must look to Mr. Eaton. 2nd. Mr. Eaton had the legal title to the land duly recorded, and Mr. Holgate bought of him without any knowledge of your claim."

To this Mrs. Eaton claimed that she had a separate estate in the lands; that the contract was made without her knowledge and contrary to her wishes, and that she was not willing to sign the
57 deed till the suit then pending relating to the disposition of the proceeds of the portion of the lands appropriated by the R. R. Co. should be terminated.

A considerable correspondence passed between the parties during the succeeding year. In February, 1876, Newbegin writes that "We are still willing to do this (pay Mrs. Eaton the balance due on the land, $3,000,) whenever we receive that deed back, properly executed. We are in possession of the land under perfect legal title, as we claim. Since you and your mother are setting up claim to it to prevent disposing of this claim, I shall in due time file a bill in court to quiet title."

Later in the same year L. I. Eaton, the son of the complainant, enquires of Mr. Newbegin whether he is ready to relinquish his interest in the land upon the payment of the amount advanced to J. B. Eaton, to which Newbegin replies that it is impossible to do that, as Mr. Holgate claimed title from J. B. Eaton and he (Newbegin) from Holgate.

In June, 1876, correspondence relating to the rescission of the contract took place, Mr. Holgate saying *that* upon terms he thinks he would close the matter if repayment in thirty (30) days of money expended and advanced was made, with bank interest, and conditioned upon J. B. Eaton's joining in recission of the contract. No result appears to have followed, except that in September, 1876, R. J. Eaton announces to the other parties that Mrs. Eaton has executed the deed, and this deed, executed by J. B. Eaton and his wife, was executed September 27, 1876, and tendered December 7th, 1876.

It included all the lands conveyed to J. B. Eaton by the sheriff, except the Michael Gorman place; also Weisengerber mill lot and land N. W. of the Toledo, Wabash and W. R. R., which had been, since the deed by Eaton to Holgate, appropriated by the railroad.

58 This deed was, on its receipt by the defendants, at once returned. The mortgage and notes, which had been the subject of foreclosure, and which Eaton in his contract had agreed to forward, if he could find them, was not produced till the trial before the referee, when they were brought forward and tendered.

It is in proof that defendants were in such possession as the nature of the lands permitted, and exercised ownership in same, by leasing and receiving some small amounts of rent for the use of the same.

The defendants claim in defense that the performance on the part of the complainants were unreasonably delayed; that the deed tendered did not convey the reversionary interest in the R. R. lands, and that the lands being bought as a speculation have depreciated in value, and that the delay of the delivery of the deed of Mrs. Eaton was such as to cause a failure of consideration, and that there should be decreed a recovery of the amount advanced to J. B. Eaton, in 1874, and to extinguish tax title, for which the lands should be sold.

The master is satisfied from the proof that the original transaction between Eaton and Holgate was one of sale, and not one of loan or advancement of money; that Eaton made an absolute conveyance of the lands, and thereby invested Holgate with the whole title thereto; he accompanied this deed with a contract. This refers to the sale as made, and to the deed already executed and delivered. It provided for the terms of payment of the purchase price, $6,000, and as the parties anticipated the appropriation by the railroad company of a portion of the lands, it postponed the determi-

59 nation of the amount to be paid to Holgate till October 1st following, when the amount of such appropriated land would be ascertained. The purchaser reserved till October 1st the right to re-sell the land to Eaton, when the amount paid by Holgate was to be refunded to him. But this election to re-sell to Eaton was not exercised; on the contrary the purchaser Holgate decided to abide by his purchase, and to hold the lands thus conveyed to him by Eaton.

From the first Holgate was invested with the title, and a title which seems to have been complete. The payments made by Holgate to Eaton, added to the amounts realized from the lands appro-

priated by the R. R. Co., reduced the amount on the purchase price to $3,000.

The conduct of the parties, during all the subsequent correspondence relating to their respective obligations, shows that the defendants, on their part, regarded the legal title fully conveyed to Holgate, and that the deed which was agreed to be furnished was only required to quiet them in the ownership from any possible claims which Mrs. Eaton might set up, and to make proceedings by bill to quiet title in the purchase unnecessary.

They had reason to desire and insist upon this conveyance, because it had been stipulated in the contract of sale, and all the testimony shows that at no time did the defendants cease to insist upon its being furnished.

Nor did they, at any time say or do what was necessary to re-cind the contract by notice of such rescission, or by attempting to place the complainants back in the position held before the sale, by tendering the conveyance of the lands, and absolute offer to take the money advanced.

60 At no time did the defendant's claim the right to annul the sale on account of the failure to receive the joint deed, but on the contrary insisted that the title was perfect, and that the required deed was only necessary to relieve the defendants from the trouble and expense attendant upon the removal of doubts and clouds upon the title by a decree in equity.

From all the proofs we must conclude the title was thus perfect in Holgate; that Mrs. Eaton had no dower in the lands, and that the deed was unnecessary; but since its execution by J. B. Eaton and his wife was stipulated in the contract of sale, the defendants had a right to claim it before the obligation to pay the purchase money should take effect. It was therefore an essential thing to be consum-ated before the complainants could ask a court of equity to enforce the obligation represented in the notes and mortgage given by defendants.

As the joint deed was tendered by the complainants before this suit was commenced, the complainants placed themselves fully in the position to demand and have the enforcement of these obligations, if the deed is in its terms and description a compliance with the contract.

The contract required that J. B. Eaton should execute "another deed of warranty, his wife being joined with him as grantor, and to forward the same," etc.; and when the appropriation of a portion of the lands by the railroad company, anticipated at the time of sale, had been consum-ated, the defendants prepared such a deed as they regarded necessary to fulfil Eaton's agreement.

This they said contained a description of the lands described in the mortgage, and excluded rights of uses acquired by the
61 railroad company in the lands appropriated. The deed which was finally executed by J. B. Eaton and his wife describes the lands contained in the mortgage, and when so executed and tendered to defendants, gave the title to all the land which they could legally convey.

Defendants insist that the deficiency in the deed thus tendered consists in the omission of the reversion of the railroad lands. While the railroad under the statute could condemn lands only for railroad purposes, when it had so condemned them, and paid their full value to the owner, they became vested with absolute title, and there could in no event of non-uses be any reversion to the owner of his heirs or assigns.

We think, therefore, that when complainants tendered a deed of the lands, excepting those so condemned, the contract was fulfilled, and particularly since it included the lands described in the mortgage prepared and executed by defendants, and corresponded substantially with the deed prepared by defendants. This must be inferred from the defendants' letters to Mrs. Eaton, which expressly declare that they do not require her to warrant title to lands which the railroad company has appropriated.

The other requirement of the contract, that Eaton should forward the notes and mortgage upon which the foreclosure had been had, if they could be found, is not, in our opinion, of essential importance, and as there is no proof that they could be found, there seems no good reason for defendants' objection.

The conclusion to which the referee is irresistibly forced by the evidence is, that the complainants have fully entitled themselves to the right to payment of the purchase money for these lands.

62 That there was a vendor's lien for the balance of the price, which rested in the heirs of J. B. Eaton and his wife, (their children, who are now parties to this proceeding,) and that if the failure of J. B. Eaton to perform any of the stipulations of his contract would at any time have formed a foundation for a claim for rescission of contract, for the reason that they were not performed as soon as the defendants desired to have them performed, the defendants, as purchasers, were bound to notify Eaton, and the parties connected with him in interest, and to take steps to rescind the contract by tendering a reconveyance and demanding payment of advances.

On the contrary, they did not tender a reconveyance, and insisted upon the right to hold the lands and enforce the contract—waiving by such conduct all objection to the time of fulfillment—until after the contract had been complied with on the part of complainants, when, it seems to us, it was too late to attempt to enfore the right to rescind.

It is therefore found that the contract was in full force and substantially fulfilled by the vendor for himself and those interested under him when this suit was instituted, and that the complainants are entitled to recover the amount of the purchase money evidenced by the notes and mortgage for $3,000, with interest, payable annually, from the first day of October, 1874, and for a sale of the land described in the mortgage.

Respectfully submitted.

JAS. D. CLEVELAND, *Referee.*

Referee fees	$250	
Pomerene & Davis, stenographers, writing testimony & copy	50	40
	290	40

63 *Exceptions to Report of Master.*

And afterwards, to wit, on the 3rd day of February, A. D. 1882, being a day of the January term, A. D. 1882, of said court, the following exceptions to master's report was filed in this cause in this court, being in the words and figures to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RUFUS I. EATON, Adm'r, and others, Complainant,
vs.
WILLIAM C. HOLGATE & HENRY NEWBEGIN, Defendants.
} In Chancery. No. 3549.

The defendants above-named, not hereby waiving any objection to the authority of the master, J. D. Cleveland, to make such report as he has filed herein under the order of this honorable court, made on the 19th day of January, 1881, take exceptions to the report of the said master, filed in said court on the 6th day of January, 1882, as follows:

First Exception.

For that the said master reported that the original transaction between John B. Eaton and defendant, Holgate, was one of sale, and not one of loan or advancement of money; whereas he should have reported that the same was *not* one of sale, but one of loan, with an option to buy the lands therein described on the conveyance to him of the interests held by both said John B. Eaton and his wife,
64 Elizabeth E. Eaton, and the performance of the other conditions of the said contract.

Second Exception.

For that the said Master reported that the said Eaton made an absolute conveyance of the said lands to defendant, Holgate, and thereby invested him with the whole title thereto; whereas he should have reported that the said Eaton made a conveyance of the said lands to said defendant which, though absolute in its terms, was, by the parties thereto, held and deemed to be only a mortgage security for the money advanced, and to be advanced.

Third Exception.

For that the said master reported that the defendants did not at any time say or do what was necessary to rescind the contract by notice of

such rescission, or by attempting to place the complainants back in the position held before the sale by tendering the conveyance of the lands and absolute offer to take the money advanced; whereas he should have reported that the tender of a deed by the defendants was unnecessary, but that they did offer to make to the said Elizabeth R. Eaton a conveyance of said lands on the repayment of the moneys advanced by them and interest, on condition only that the said John B. Eaton, with whom the contract of purchase and sale was first made, joined in the rescission.

Fourth Exception.

For that the said master reported that the said joint deed of John B. Eaton and Elizabeth R. Eaton was tendered by the complainants before the suit was commenced, and that thereby the said complainants placed themselves fully in the position to demand and have the enforcement of these obligations, if the said
65 deed is in its terms and description a compliance with the contract; whereas the said master should have reported that by the neglect, laches, delay, and wrongful conduct of said Elizabeth R. Eaton and those interested with her and under her, the tender of the said deed was not in season, and not in equity and good conscience a fulfilment of the obligation imposed on her at the time of the receipt of the said notes and mortgage to take effect on delivery of deed.

Fifth Exception.

For that the said master reported that the deed which was finally executed by J. B. Eaton and his wife describes the lands contained in the mortgage, and when so executed and tendered to the defendants gave the title to all the lands which they could legally convey; whereas the said master should have reported that the said deed which was finally executed was not the deed which defendants placed in the hands of the said John B. Eaton and Elizabeth R. Eaton, upon the execution and delivery of which the notes and mortgage upon this suit was brought were to take effect, and that said deed so finally executed did not give title to all the land which they could legally convey, and did not contain the lands mentioned in the original contract.

Sixth Exception.

For that the said master reported that when said railroad company had condemned the lands (a portion of said lands described in deed forwarded for execution and delivery with the said notes and mortgage), and paid their full value to the owner, they became vested with absolute title, and there could in no event of non-use be any reversion to the owner or assigns; whereas he should
66 have reported that said defendant deemed reversion of said lands, condemned by the railroad company for railroad purposes, the most valuable portion of the said lands, and purposely and intentionally inserted the description of same in the deed forwarded by them to the said Elizabeth R. Eaton in order to obtain

the title of the said J. B. Eaton and his wife therein to the reversion, only excepting it from the operation of the covenant of warranty in the said deed on the part of the said John B. Eaton and his wife.

Seventh Exception.

For that the said master reported that the requirement of the said contract that Eaton should forward the notes and mortgage on which the foreclosure had been made was not of essential importance; whereas he should have reported that the forwarding of the said notes and mortgage was of essential importance as a muniment of title, and as showing the authority under which he acted, and which the said Elizabeth R. Eaton disputed, and that the testimony showed they were in keeping of one of the sons, now a complainant, by supplementary bill, and in the control of the said Elizabeth R. Eaton up to the 30th day of June, 1881, when the same were for the first time tendered to the defendants.

Eighth Exception.

For that the said master reported that the complainants have fully entitled themselves to the right to payment of the purchase money for these lands; whereas he should have reported that the complainants have entirely failed to show themselves entitled to foreclose the mortgage upon which this suit is founded.

67 *Ninth Exception.*

For that the said master reported that there was a vendor's lien for the balance of the price, which vested in the heirs of J. B. Eaton and his wife; whereas he should have reported that the said suit, being upon a mortgage which was to take effect on delivery of a deed, and that said deed never having been delivered the said mortgage never took effect, and that no vendor's lien is raised by the pleadings or sustained by proof in the said suit.

Tenth Exception.

For that the said master reported that the defendants, as purchasers, were bound to notify Eaton and the parties connected with him in interest, and to take steps to rescind the contract by tendering a reconveyance and demanding payment of advances; whereas he should have reported that the defendants were excused from tendering a reconveyance because of the neglect and refusal to repay the advances on the part of Elizabeth R. Eaton.

Eleventh Exception.

For that the said master reported that he had found that the contract of purchase and sale of the lands by and between William C. Holgate and John B. Eaton was in full force and substantially fulfilled by the said vendor for himself, and those under him, when the suit was instituted; whereas he should have reported that he

had found that the said contract was a conditional contract, and that the conditions to be kept and performed by the vendor, and those interested with him, were not substantially fulfilled by the said vendor and those interested under him, but that the conditions to be kept by the said defendants were fulfilled by them.

68 *Twelfth Exception.*

For that said master in said report reported that he had found that the complainants were entitled to recover the amount of the purchase money evidenced by the notes and mortgage for $3,000, with interest payable annually from the first day of October, 1874, and for sale of the land described in the mortgage; whereas the said master should have found that the said complainants are not entitled to recover the amount of the purchase money, or the amount of said notes, or for a sale of the said lands to satisfy the claim so found by said master against the defendants.

Thirteenth Exception.

For that the said master should have reported that the defendants were entitled to a decree for advancements made by them, with interest, as upon a recission of contract, and for delivery up and cancellation of the notes and mortgage sued upon as prayed for in their cross-bill.

Fourteenth Exception.

For that the said master should have reported that the said Elizabeth R. Eaton, and those interested under her, by their negligence, delay, and laches and wrongful and inequitable conduct, had forfeited all rights under any contract with the said defendants, and that the said defendants were thereby discharged from all further obligation on the said notes and mortgage.

WM. C. HOLGATE,
In Person.
B. B. KINGSBURY
Solicitor for Defendant, Henry Newbegin.

69 *Petition for Rehearing.*

And afterwards, to wit, on the 8th day of February, being a day of the January term, A. D. 1882, the following petition for a rehearing of the case was filed in this cause in this court, to wit:

In the Circuit Court of the United States, Northern District of Ohio.

ELIZABETH R. EATON, Complainant,
vs.
WM. C. HOLGATE & HENRY NEWBEGIN, Defendants.

To the honorable the judges of the circuit court of the United States for same district:

Your petitioners, William C. Holgate and Henry Newbegin, re-

spectfully shows that heretofore, on the 7th day of February, A. D. 1882, the above cause was heard, and a decree therein entered for the complainants and against your petitioners, which your petitioners respectfully show and hope to make appear is erroneous, and that such errors, mistake, and omissions have been made at the hearing of the same cause, as that a rehearing of the same should be ordered in behalf of your petitioners.

Your petitioners do herein set forth the reasons why a rehearing of the same should be granted as follows:

First. Your petitioners were taken by surprise in having the
70 cause called to be heard before the circuit judge *alone*, whereas they expected that the same would be heard by both the district judge of the United States for this district and the circuit judge, so that they might have the benefit of the skill and learning of both said judges, and in the event of the opposition of opinion upon any question which should occur on the hearing the said cause, that the decree thereafter entered might be reviewed by the Supreme Court of the United States. That had they believed the decision on said hearing should not be united in by said district judge they would have applied for a postponement of the hearing until the district judge could sit in the hearing of said cause, or for a submission of the same on briefs, as had been previously offered by the counsel for the complainants, and file affidavit of counsel herewith.

Your petitioners say that they are not advised whether the said cause can be appealed to the Supreme Court, but the decree herein is for a very large amount, and your petitioners feel aggrieved thereby, and say that they should be afforded a rehearing of the said cause, before both of said judges, by reason of the uncertainty of their right to appeal in the premises.

2nd. Because the circuit judge on the hearing hereof refused to consider or admit the testimony of defendants; that the same, if considered by the said judge, would have changed his opinion as to the equities of the said parties, and would have fully sustained the averments of the answer and cross-bill of your petitioners as to the inequitable and wrongful conduct of complainants in the premises; as
to the nature and extent of the possession of petitioners of
71 said lands; as to excuse, as your petitioners claim, for want of tender of reconveyance; as to the materiality of time to them for the performance of the contract; as to the value to them of the tract of land omitted from the deed tendered by said Elizabeth R. Eaton; and, in general, as to all other matters in issue between the said parties in the said cause.

3rd. Because, as your petitioners respectfully represent, the said judge has erred in matter of law herein.

4th. Because the said judge has erred in the conclusions of fact from the evidence.

5th. Because the said judge has erred in decreeing that interest should be paid by your petitioners on the notes in suit from their date, whereas interest should be allowed at most only from the alleged tender of deed by complainants, or more equitably, as your petitioners aver, from the hearings, there being no proof of any bene-

ficial use of said premises, or any possession, except a mere declaration thereof, and the receipt of the insignificant sum of $25.00.

B. B. KINGSBURY,
Counsel for Henry Newbegin.
WILLIAM C. HOLGATE,
Counsel for Himself.

And afterwards, to wit, at the January term, A. D. 1882, of said court, the following petition for rehearing was entered in this cause in this court, to wit:

71*a* *Petition of Defendant Holgate for Rehearing.*

In the Circuit Court of the United States, Northern District of Ohio.

ELIZABETH R. EATON, Complainant,
vs.
WILLIAM C. HOLGATE AND HENRY NEWBEGIN, Defendants.

To the honorable judges of the circuit court of the United States:

Your petitioner, William C. Holgate, respectfully shows that on the 7th day of February, A. D. 1882, the above-entitled cause was heard in part only, and a decree was therein entered for the complainants and against your petitioner and the said Henry Newbegin for the sum of $——, which your petitioner shows, and hopes to make appear, is erroneous, and that such errors, mistakes, and omissions have been made at said partial hearing of the same as that said decree should be set aside and a rehearing should be ordered in behalf of your petitioner; that the contract and proofs and law of the case fully considered would have made appear—

1st. That this petitioner took the original deed, though absolute on its face as a mortgage security for a $400 loan made to John B. Eaton when in very necessitous circumstances, that he might save the land in controversy from being sold on execution at a great sacrifice and for advancements that might thereafter be made.

2nd. That, grateful for this kindness, John B. Eaton gave this petitioner an option for 60 days to buy said land or not, as petitioner might choose, on terms stated in said contract, with the understanding that said Eaton should execute another deed to this petitioner, in which his wife should join in the granting clause and body of the deed.

71*b* 3rd. That this petitioner accepted within the 60 days the proposition to buy, and at the request of John B. Eaton this petitioner mailed the notes and mortgage *herein sued upon* in a letter, which also contained a blank deed filled out for execution by said Eaton and his wife, to the said Elizabeth R. Eaton, relying on their good faith in executing and returning their deed within a short and reasonable time, or that they would return the notes and mortgage.

4th. That this petitioner had no right or title in or to said premises further than as a security for said advancements, and he never

claimed he had, or authorized any one to make such a claim in his behalf.

5th. That this petitioner had opportunities to sell and make use of said land to his advantage and profit, but dare not dispose of same without a deed joined in by the said Elizabeth R. Eaton, having learned that she was the equitable owner of the land, and that she repudiated the contract of the said John B. Eaton for its sale.

6th. That for about one year and eight months this petitioner waived the laches of the said John B. Eaton, hoping and trusting he could induce his wife to join him in the execution of said deed agreed upon; that when said year and eight months had elapsed, and the growth of the town had taken a different direction, and the property had become depreciated more than one-half, the same being an open, unoccupied common, this petitioner sought to get his money back, offering to make a release of his rights when the money should be returned, and continued this offer from this on, repeatedly making it for the remaining six months that elapsed, to the time of the pretended tender, Dec. 8th, 1876, and on to this day.

7th. That this petitioner was the vendee of a land contract,
71*c* and as such promptly tendered his notes and mortgage; that these were ruthlessly appropriated by the vendor *whilst he held on to his title;* that this exhibit of this vendors' (the complainants') fangs justifies this petitioner in requiring payment before he releases his mortgage.

WM. C. HOLGATE,
Counsel in Person.

And afterwards, to wit, at the January term, A. D. 1882, of said court the following decree was entered in this cause in this court, to wit:

72 *Decree.*

In the Circuit Court of the United States, Northern District of Ohio.
In Chancery.

RUFUS J. EATON, Adm'r, Complainant,
vs.
WM. C. HOLGATE *et al.*, Defendants.
} Decree. No. 3549.

This cause came on to be heard at the January term, A. D. 1882, of said court, before Hon. John Baxter, circuit judge, &c., upon the bill of complaint and amendment thereto, the demurrer and answer of defendants, William C. Holgate and Henry Newbegin; the cross-bill of said defendants; the answer of Elizabeth R. Eaton to said cross-bill; the bill of revivor of Rufus I. Eaton, administrator of the estate of the said Elizabeth R. Eaton; the supplemental bill and the joint answer of the defendants, John Eaton, Lewis Eaton, Alonzo Eaton, and Horace Eaton, and upon the exhibits and testimony in said cause filed, and was argued by counsel; and thereupon the court, being fully advised in the premises, does overrule said demurrer; and it appearing to the court that the said Elizabeth R. Eaton having died during the pendency of this cause, and that the said

cause stands duly revived in the name of Rufus I. Eaton, her administrator, duly appointed and qualified, the court does find—

That the complainant, Rufus I. Eaton, as administrator of Elizabeth R. Eaton, is entitled to have the mortgage referred to in the bill foreclosed, and that the amount due thereon on the 3rd
73 day of January, A. D. 1882, being the first day of this term, including principal and interest, is $4,310 (four thousand three hundred and ten dollars).

It is therefore ordered, adjudged, and decreed by the court that the said complainant, Rufus I. Eaton, as administrator as aforesaid, have and recover from the defendants, Wm. C. Holgate and Henry Newbegin, said sum of $4,310, with interest from said 3rd day of January, A. D. 1882, till paid. And it is further adjudged and decreed that the cross-bill of Holgate and Newbegin be, and the same is hereby, dismissed.

And it is further ordered and decreed that the said Rufus I. Eaton, as administrator as aforesaid, pay one-half the costs of these proceedings, and that the defendants, William C. Holgate and Henry Newbegin, pay the other half of said costs, to be taxed.

And it is further ordered and decreed that the said defendants, William C. Holgate and Henry Newbegin, pay into court, within sixty days (60) from the entry of the decree, the said sum of $4,310, together with interest thereon from the 3rd day of January, 1882, to day of payment, and that in default thereof an order of sale issue to Wilber F. Goodspeed, who is hereby appointed as special master commissioner, commanding him to sell said mortgaged premises, situated in the county of Defiance, State of Ohio, to wit:

That part of the east half of section twenty-seven (27), in township four (4) north, range four (4) east, lying between the Fort Wayne road and the Wabash and Erie Canal, excepting therefrom all thereof lying north of the line of the T. W. & W. R'y tracts, and also excepting therefrom some twelve (12) acres heretofore conveyed by one Michael Gorman, and also some five (5) acres upon which the Weisenberger saw-mill stands; and which lands, with the
74 parts as excepted are more particularly described in a deed of this date of said John B. Eaton and Elizabeth R. Eaton, conveying the same to these grantors, it being intended hereby to convey the same lands as in said deed are described, and to secure a part of the purchase price of which this mortgage deed is executed, together with the privileges and appurtenances to the same belonging, and to cause the same to be first appraised and advertized according to law as on execution at law, and that the proceeds of said sale be apply—

1st. To the payment of one-half of the costs of this suit, to be taxed against complainant, Rufus I. Eaton.

2nd. To the payment of said sum of $4,310.00, and the interest thereon, as aforesaid.

3rd. The balance of said proceeds, if any, to pay to the said defendants, Wm. C. Holgate and Henry Newbegin, and to make due return of said process to this court according to law. And in case said proceeds are not sufficient to pay said costs, and said sum and

interest so decreed to be paid, it is ordered that execution issue from this court against the said defendants, Wm. C. Holgate and Henry Newbegin, for the amount of such deficiency.

It is further ordered and decreed that the deed from John B. Eaton and Elizabeth R. Eaton, his wife, dated October 1st, A. D. 1874, and tendered to said defendants, Holgate and Newbegin, and conveying the above-described premises, be delivered to them.

And it is further ordered and decreed that the complainant, personally and as administrator, and the said John Eaton, Lewis Eaton, Alonzo Eaton, and Horace Eaton, defendants, within sixty
75 days from the entry of this decree, execute and deliver to said William C. Holgate and Henry Newbegin of any and all interest, revi-sionary or otherwise, which they, or either of them, have in the following-described premises, to wit:

All that portion of land situated in the county of Defiance, State of Ohio, formerly owned by John B. Eaton, lying north of the Toledo, Wabash and Western Railway tracts, appropriated by the Baltimore, Pittsburg and Chicago Railway Company, (Ohio Division,) under proceedings had in the probate court of said county, in which said company was petitioner against the said John B. Eaton, Elizabeth R. Eaton, and others, defendants, and that in default of the execution and delivery of said deed this decree shall operate as such deed and conveyance, and in lieu thereof, and bar said complainant and said John Eaton, Lewis Eaton, Alonzo Eaton, and Horace Eaton, or either of them, from making or setting up any claim to said last-mentioned premises, except under the mortgage herein foreclosed.

It is further ordered that J. D. Cleveland be, and he is hereby, allowed $100 for his services rendered as special master in this case, to be taxed as part of the costs of the cause.

From this decree the defendants, Holgate and Newbegin, pray an appeal to the Supreme Court of the United States, which is allowed on executing an appeal bond in the penalty of $2,000, with good security, to be approved by the clerk, which, when accepted by the clerk, shall operate as a supersedure of the foregoing decree, and sixty days are allowed in which to execute said appeal bond.

76 *Testimony of Henry Newbegin.*

ELIZABETH R. EATON *vs.* WM. C. HOLGATE *et al.*

Before J. D. Cleveland, referee. Filed Jan'y 6th, 1882.

United States Circuit Court, Northern District of Ohio.

ELIZABETH R. EATON, by her next friend, RUFUS I. EATON,
vs.
WILLIAM C. HOLGATE and HENRY NEWBEGIN.

Before J. D. Cleveland, Referee.

CLEVELAND, OHIO, *May* 30, 1881.

HENRY NEWBEGIN, one of the defendants, being duly sworn, testified as follows:

(Testimony objected to for incompetency, the objection to be disposed of before the close of the case.)

Prior to July 30th, 1874, for a year or more, perhaps, I had been acting as the attorney at defiance in all matters of John B. Eaton, then resident at Freiburg, Maine, but who had been resident, with his wife, the original complainant in this suit, at Cincinnati. He was a practicing lawyer there for many years. He had, by Hill and Meyers, his attorneys before I became such, in a cross-petition in the case of Van Pelt *vs.* Weisenberger, foreclosed a certain mortgage. My recollection is to secure three notes, and in that suit he had bid in the lands in controversy now before this court, and took a
77 deed of the lands in his own name from the sheriff of Defiance county under the order of court. The whole proceeding, indeed, appeared in his name from beginning to end. There was a large bill of costs that had accumulated in this case, and some time in the spring of 1874 there were two executions issued against Eaton for costs in this case of Van Pelt *vs.* Weisenberger, and the sheriff was about to sell this land. I protested, as Eaton's attorney, against the issuing of executions against him, or that they had any right to do it; that if the costs were not made out of the purchase money it was a question between the sheriff or the officers of the court and Eaton himself in the case, and if they had not been made it was their own fault; that they could not then go upon the land or any property of Eaton there for those costs. But, in spite of my protest, a levy had been made on this land by the sheriff on two executions—and right here, I don't know why two executions were issued instead of one; I don't know anything about that—on two executions, amounting in the total, my recollection is, to about, well from $120 to $130, perhaps more. Well, as Eaton's attorney, I undertook to pay the money on the purchase, and save his lands from sale; but, not having it myself, the sheriff having begun the sale, I asked him to suspend a moment, and I would try to raise it. I went to Mr. Holgate, who is always a moneyed man with us—the only moneyed man we have there—and he offered, upon my becoming personally responsible to repay, to advance this money, and did so. I think I gave him a note signed in Eaton's name, by myself as attorney—I don't know—and perhaps endorsed it myself. Anyhow, I gave him Eaton's note for it, I know—took
78 the responsibility of signing his name. Subsequently to that Mr. Eaton came out there. I had had some correspondence with him. The Baltimore, Pittsburg and Chicago Railway, being built by the Baltimore and Ohio Railroad Co., was then located through there, and pretty nigh to these lands. They wanted to purchase a portion of this land for stock-yards and transfer grounds to the Wabash road, and I undertook to negotiate the sale to the company on the part of Eaton of a portion, about a thirteen-acre tract of land, which was in the form of a flat-iron piece, between what was termed the old Fort Wayne road, on the Wabash road. The Baltimore and Ohio road wanted the whole ground between the Maumee river and the Wabash road; this flat-iron piece lay between,

and, by the way, was considered more valuable at that time, than all the other put together. The land in question here is about sixty acres—sixty to sixty-three. I offered to sell on the part of Eaton to the company that land for $1,700. But some differences arose between us as to title—whether I could give good title as Eaton's agent and attorney—and the sale from some cause or other fell through. Eaton was ready, however, to deed for that sum, after this cost matter had been got along with, these executions. I wrote Eaton to come out there. He came out and I told him that Mr. Holgate had made this advancement of money, and it was necessary to repay him. He at first—he was a pretty stubborn old man—he at first went square back on my power to borrow money in his name, and kicked pretty severely, so that we had quite a con-
79 troversy in his office. I told him that if he did not want to pay Eaton back I knew how to get it out. However, Eaton afterwards came to the conclusion that I was right, and thanked me for what I had done, and wanted me then to see if I could not effect a sale of the whole tract of land for him, including that to the railroad. I told him that the railway company had got their back up for some cause or other, and would not purchase; that they thought they ought to have it for about a thousand dollars; that was what their attorney was claiming, and that, without reference to title one way or the other, we then could not sell to them for anything for anything over a thousand dollars; they were determined to condemn it. Well, to make a long story short, Mr. Eaton saw Mr. Holgate two or three times himself, and I saw him two or three times with him. It finally resulted in this contract of sale. I was present when this contract of sale was made; not when the contract was written out, as I know of. It is in Mr. Holgate's handwriting. But I was present when the contract was concluded—when a conclusion was arrived at—as Mr. Eaton's attorney. Although it was understood between us all that if after the whole thing was over I wanted to step in, I was to remain in it as Mr. Eaton's attorney, and act for him in the appropriation proceedings till after that whole thing was determined; then, if I wanted to step in and purchase one-half of an interest in this land of Mr. Holgate it was understood between us all that I was to have the privilege to do that after I had got through with the railroad company as Mr. Eaton's attorney. This sale was consum-ated then and there, as I say, and the contract will speak for itself. I need not state what it is, but it was expressly understood, both by Mr. Holgate and Mr. Eaton,
80 that I should step in there, and, as Eaton's attorney, squeeze out of a jury the last cent against the railroad company to apply upon the purchase money of these lands, because the more I got out of them the better it was for all sides, the result was that $2,600 was given by the jury to Mr. Eaton for this flat-iron tract of land. Under a statute of our State, which lawyers are well aware of, in these appropriation proceedings by railroads the condemnation money is paid into the probate court, and there is a provision that claimants may litigate as between themselves. Under that provision in the statute, the railroad company hearing that there was

some other claimants here, and perhaps having made them parties; I don't know. This Adam Wilhelm had a claim, and Mrs. Eaton and her children were made parties, perhaps, in the appropriation suit; I think they were. The money was paid into the probate court and took the place of the land, under a provision in the statute, on the part of John B. Eaton, who held the naked legal title to the land. I brought suit in the court of common pleas, making all the parties defendant, to have that money paid over to Eaton, as his attorney, and after quite a long controversy on demurrer by Mrs. Eaton to my petition the court overruled the demurrer, rendered judgment in favor of Eaton, and directed the money to be paid in full to Eaton; I drew it, as his attorney, and sent it to him, and he sent my attorney's fees, every dollar of it. That decision was final as to the right to the money. It was never further contested—that is what I mean by that—on the part of Mrs. Eaton's attorneys, nor the others. They were all represented there, Hill and Meyers were represented; I had, however, prior to the
81 final adjudication of this case to pay over the money, some correspondence with Mrs. Eaton, perhaps connected with this contract, and perhaps not; my recollection is now at fault in regard to that, but I wrote her this; that there was a controversy in regard to the money, which she claimed; that I was acting for Eaton; that he claimed it, and that without any regard, now, to Eaton, one way or the other; they had differences between them; it culminated in divorce; I don't think they were living together at that time. I wrote her that if she would just name any man there; I was formerly in Maine myself, and was acquainted with some persons; I suggested two or three prominent lawyers in Portland, an adjoining county, among them I know, William LeBaron Putnam, a partner of George Evans, and one or two others; Eaton was a practicing attorney there himself; I suggested to her that she permit me to draw that fund from the court, and put it into the hands of a trustee there, and let them fight their quarrel out to the bitter end, and I did not care which licked; that I would take an order of court, but she would not accede to that; that was before the decision; that was while Tom, Dick, and Harry, and everybody else were claiming the money, but the only real contestants for that money were Mrs. Eaton, through her son, Rufus I. Eaton, the administrator here, he in fact represented his mother in all things, I may say that now here, once for all, so far as our correspondence was concerned; I tried to effect that in two or three letters, but could not, and did not, till finally, it coming to a head, and we wanting no further delay, after full argument, and the court holding it under advisement one term, decision was rendered in our favor,
82 and I drew the money, as I say, and paid it over to Eaton. This money was paid over soon after the September term, 1874, of the court of common pleas, and the final decision was rendered at that term. I think I paid Eaton that money in my office at Defiance; I think he was out there. I think it was at this time that I paid that money over at my office to Mr. Eaton. I don't particularize the date, but about this time. I won't pretend to say

whether I sent it to him by draft, or whether he was there. He had been out there. My present impression is that he had gone away, and I sent it to him by draft. He was there at that term, at any rate—September term of court. Our terms at that time lasted but a short time. Mr. Eaton assented to the payment to Mrs. Eaton of the balance due. Indeed, he assented to the payment of all to her, if we chose to do it, if she would sign the deed. He had done that repeatedly, except the $2,600; he always claimed that; always claimed he would have it, although he assented to the placing it in the hands of a trustee in the east. Under this provision, under his assent, and as an inducement to get her to comply with that contract, he told me that we might pay her the $3,000 if she would sign the deed under the terms of the contract. It had gone on from July to October. She had utterly, as Eaton claimed, refused to execute any paper whatever on her part, and Eaton claimed to us, as we shall show by his letters, that he was anxious to comply with the contract; that he could not do it, because his wife would not sign the deed; that he was helpless; that he could not induce her to sign the deed,
83 and, with his assent, that we pay the balance of the purchase money, after this $2,600 was taken out, over to her. I drew these notes and the mortgage in question. The condemnation of the land had then been effected, and, deeming the notes well enough secured, I did not put into the mortgage or include in it the description of the land that had been appropriated for railway purposes; but the whole is included in the contract. I drew these notes and mortgage. I signed them myself first, leaving a space above for Mr. Holgate to sign. I had then acquired an undivided half interest in the land by quit-claim from Mr. Holgate. I do not remember the date of the quit-claim. It was prior, however, to this, I think, anyhow, I had an undivided half in it. No, I did not get a quit-claim till subsequently—Sept. 15th, 1875. I say I left a blank above for Mr. Holgate to sign. I took these notes and mortgage over to Mr. Holgate's office, and it seems that we both executed the mortgage before Notary C. B. Squire. This, I am confident, was done in Mr. Holgate's office. The notes and mortgage were dated back to comply with the contract; they were not sent on till June, 1875; the mortgage was dated back to the date of it, but the acknowledgment is not dated at all, I see. The date of the note is October 1, 1874, and the date on the mortgage above our signatures is the same. The date of the contract is July 30th, 1874. Failing to get her to sign the deed, we came to the conclusion, that as an inducement, with Eaton's consent, we would make these notes and the mortgage payable directly to her. It was very important to us that we should get title to that land at once. The railway company had com-
84 pleted its line, and it was open for traffic to Defiance in August, 1874, one month after this contract was made. At the time we purchased this land—that is, at the time of the contract of sale and purchase with Eaton—it was understood between us all—Mr. Holgate, Mr. Eaton, and myself; and I will state that Mr. Holgate at the time was a director in the railroad company and knew of their movements; that in addition to the location of stock-yards and

transfer grounds between the Baltimore and Ohio railroad and the Wabash railroad, which had been constructed there for a number of years, the Baltimore and Ohio Railroad Company, who were constructing this Baltimore, Pittsburg and Chicago railway, they owned every dollar of capital in it; it was constructed under that name; that was the local corporation, for the purpose of holding title, franchise merely, would make Defiance its chief division for the stoppage of trains, and changing of engineers and conductors, between Chicago and Chicago Junction; it should be one of its divisions; it should be one of the division points on its main line, and the only division at that time contemplated; and, also, that there would be located, and right on this very ground, machine shops of the company, repair and machine shops, construction shops, and everything connected with a large line of railroad; and the price fixed by us—Eaton, Mr. Holgate, and myself—and paid, or agreed to be paid, was in contemplation of these large improvements to go right on a part of this thirteen-acre tract to be condemned, and the lands which the company had already purchased adjoining it, some forty acres
85 in all, and that thereby we might have an opportunity to speculate out of the sixty acres of land which would be adjoining this very thirteen-acre tract, right over across the Wabash. That was the only purpose and object that I had in view in the purchase of it, as I told Mr. Eaton, as his attorney, and also told him, as a part of the object, that I wanted the right to take from Mr. Holgate a half interest there. It had gone on from July, 1874, to June, 1875, Mr. Eaton professing to us all the time that his wife absolutely and wholly refused to do anything towards giving us title to that land. We kept urging him to do so; that we had opportunities then to sell, and could not, because her son, in her name, was claiming title there. He came out there personally and claimed that he owned that land; forbade everybody to interfere with it; that we had no title and could have no title; that it belonged to them; and as an inducement, with Eaton's consent, to get her to convey the land and stop her interference with us in selling the land now, I wrote these notes and this mortgage. As I say, I dated them back to the time they were to draw interest purposely. I made them non-negotiable. Now, I wrote a letter to Mrs. Eaton at this time—I know that—but whether I took it to Mr. Holgate to be forwarded with his with the notes and mortgage, or whether I sent it directly, I cannot say. I cannot swear that she received the letter, but I can swear what I said in it. I am very positive that from June 6th to June 8th, 1875, inclusive, one of those days, I wrote a letter to Mrs. Eaton, and I intended it to be sent to her. Aside from the fact that this
letter is here, I should say that I mailed it concurrently with
86 the one to Mr. Eaton June 7th. I wrote Mr. Eaton also June 7th.

(This testimony, the contents of a letter written by the witness between June 6th and June 8th, 1875, to Mrs. Eaton, is given subject to the objection that if further proof of receipt and loss is not furnished, it shall be stricken out.)

I say I know I wrote a letter; that is, I believe, as firmly as I believe I can remember any fact, that I wrote a letter to Mrs. Eaton about that time without taking a press copy of it. In that letter—it was not a long letter—I stated that with Mr. Eaton's consent we had concluded to pay her all the balance that would be due upon the purchase price of that land if she would execute her part of the contract, the deed, with Eaton, and permit him to send it to us, and that to place the payment of the money to her beyond all question, I had prepared notes and mortgage which Mr. Holgate would sign with me, payable to her alone, and that they were to be considered hers, (I am stating the substance, of course; I don't undertake to state the exact language) if she would return to us the deed; that while the notes were not negotiable—and I recollect this distinctly now—that while the notes were not negotiable, because we did not intend to part with any rights, or permit anybody else to collect them, they would be promptly paid, if she complied with her part by execution of the deed, upon their presentation to us by anybody holding them for her, or that she could send them to the National Bank at any time and the money would be paid there. That is all I recollect telling her in that, except this, that Mr. Holgate would write her fully explaining matters to her. I requested Mr. Holgate to write, and he did so, wrote this letter.

87 (The letter referred to is hereto attached, marked "Exhibit 1.")—Found on page 161.

I also wrote Mr. Eaton, of date June 7th; I think the same date as Mrs. Eaton's; I will say that to the best of my recollection I mailed that letter to Mrs. Eaton at the post-office. I may add, of the matters I forgot in that letter of mine, that I also said that I had left blank the deed—I refer to the deed back for the land—and I told her I had left it blank as for the date and time of acknowledgement, but that she might return it to me with the mortgage, and upon acceptance of the mortgage, I would have both the deed and the mortgage put upon record concurrently. The notes and mortgage referred to in Mr. Holgate's letter were the notes and mortgage sued on. I took them to him, and he wrote the letter. That deed that I wrote never was executed, never returned. There was a deed conveying a part of the land which they undertook to return and claim as a tender over two years afterwards, but it did not include the most important part of the land; that is, the reversion of the railroad tract. I think I may say that to this day the railroad never has occupied only just about an acre and a half, and the title, as it now stands, rests in Eaton and not in us.

By Mr. HOLGATE:

Question. State whether that deed that you sent on to them to execute included that reversion.

A. O, yes; the deed that I sent on to them to execute included the legal title to the whole of the land.

Q. That was not returned?

A. That never was returned, nor none like it. The thirteen-acre

tract, in other words, in the deed that they undertook to tender to us was omitted. In the deed that I sent for execution, the description of the land conformed to the contract; that is, it con-
88 tained the land that we purchased of Eaton. I may state right here that afterwards, repeatedly, I told Eaton that the deed must contain the reversion; that I considered that the most valuable part of the property, and under no circumstances would we pay the price agreed upon unless the whole was included in the conveyance. I wrote June 7th, 1875, a letter to Mr. Eaton, and I have a copy of it here that I would like to introduce in evidence.

(The copy of the letter referred to is hereto attached, marked "Exhibit 2.")—Found on page 159.

I got a letter from him dated the 15th of June acknowledging the receipt of my letter.

(Letter from Mrs. Eaton to William C. Holgate, dated Freiburg, Maine, July 13th, 1875, introduced, marked "Exhibit 3," and hereto attached.)—Found on page 169.

I will say right here that the notes and mortgage, however, never were tendered back to us from that time on, and the first time I ever saw them was to-day here, when they were presented to the court. I introduce also original letter of July 6th, 1875, from myself to Mrs. Eaton.

(Letter referred to hereto attached, marked "Exhibit 4.")—Found on page 166.

In answer to that I received no letter for years; I think not till 1877, when Mr. Holgate or myself, I don't know which, received a letter dated the 19th day of March, 1877. On May 22nd, 1876, I received a letter in Mrs. Eaton's handwriting. I never received any received any response to that proposition.

(Letter of May 22nd, 1876, introduced in evidence, and attached hereto, marked "Exhibit 5.")—Found on page 179.

I will state in this connection that her son had been out there in the fall of 1875—latter part of September or October, I won't
89 pretend to give dates, because I cannot—and I met him at his attorney's office—Rufus I. Eaton—at the office of Hill and Meyers, and he was then represented to me as acting for his mother at that time, and in a conference with him he absolutely refused on his mother's part to invest us with the title to the land; said his mother would not do it, claiming that the land was worth $100 an acre at least, what there was left of it, this sixty acres about; and I asked him then if he would not have his mother send us back our notes and mortgage and pay us back the money; if he would not take my part of the interest off my hands; that with me it was the last opportunity I should ever give them to accept that money and give no title; that the land had depreciated in value; that it was not worth then $2,000, and could not be sold for that; that he might have my interest back. At first I claimed the two hundred dollars and interest, and half that I had paid out, about $400 for

taxes to Wilhelm then—$424 that we had both paid in addition to the $400; that he might have my interest back personally, if he would give me back simple interest for what I had paid out, I would quit-claim him all my rights there; and before I left the office I told him that I wanted to get rid of it, and that I was going to get rid of it; that if he claimed the land was worth more, so far as I was concerned, he, or his mother, if they would discharge me from all liability in the premises to Mr. Eaton, as trustee, might take what I had put in and go; he refused to do it; either to discharge me on the notes or to give title to the land. He said he had come out there—this statement was made prior to this—to see about what the land was worth, on his
90 mother's account. The land was worth nothing, except for speculative purposes. Defiance had taken quite a growth, anticipating the construction of the Baltimore and Ohio Railroad Company's line through there, and I told Mr. Eaton that all we wanted of the land was to cut it up into lots and sell out again, and that his claim back the previous spring and summer had been noised about the town there, and that we could not sell it at any price; that while Mr. Holgate was abundantly good upon his warranty deed for any amount of land he wanted to sell; that in negotiating, or attempting to negotiate, a sale of that land everybody said they would not buy a lawsuit; that it had become common talk there that the land belonged to him and his mother, and that we could not convey title. "Now," said I, "I want this stopped, once for all; I want you immediately to invest us with the title to that, so that we may lose no more than we have done, or I want you to give us up our notes and mortgage." He refused to do either, as I said. I then asked him why it was that his mother had refused to respond at once to execute that deed which I had sent on, and still did not return us the notes and mortgage; and, using an expression which I have used here—it is quite frequent with me—told him they "could not have their cake and eat it too." That is the last time I have seen him. I will state, however, that as a matter of fact we could at that time have sold the land if it had not been for the claim that they were setting up to title; to have saved ourselves and made a reasonable compensation of eight or ten per cent. on our money if we could have had it during the early part
91 of that summer of 1875, notwithstanding the railroad shops were not there. The land from that moment depreciated; it had a fictitious value; the land from that moment depreciated, and to-day it is not worth to exceed $1,500 or $1,600.

By Mr. HOYT:

Question. When was this interview with young Eaton?

A. It was in the fall of 1875, I think; I cannot give the date; I think it was 1876 instead of 1875.

Adjourned until 2 p. m.

AFTERNOON SESSION, 2 o'clock.

HENRY NEWBEGIN—testimony continued:

The WITNESS: I am still quite strongly impressed that the inter-

view I have already related with Rufus I. Eaton was in the fall of 1875, but it may have been in the spring of 1876. I find I have no data from which I can refresh my recollection about it. On February 17, 1876, I wrote him a letter. (Reads.)

(A copy of the letter referred to is hereto attached and marked "Exhibit 6.")—Found on page 173.

I should say that the interview I had with him was after that letter; I believe from having read that letter. I received a letter from Mr. R. I. Eaton on the 14th of March, 1876, of which the following is the original. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 7.")—Found on page 174.

On the 18th of March, 1876, I wrote him again, of which I have a copy in my hands. (Reads.)

(The copy of the letter referred to is hereto attached and marked "Exhibit 8.")—Found on page 174.

On the 17th of April, 1876, I received another letter from Mr. Eaton. I don't say that I received it—it was dated on the
92 17th of April. I received it on the same evening probably, or shortly after. (Reads.)

(The same is hereto attached and marked "Exhibit 9.")—Found on page 175.

I am prepared to testify positively that it was in the fall of 1875 that the interview I had with young Eaton took place, as I testified in my first testimony. On the 24th of April, 1876, I wrote him again. (Reads.)

(A copy of the letter referred to is hereto attached and marked "Exhibit 10.")—Found on page 176.

The witness produced a letter from Mr. Holgate to Mrs. Elizabeth *H.* Eaton, dated June 13th, 1876, which is hereto attached and marked "Exhibit 11")—Foun on page 181.

The following letter, dated June 3d, 1876, is in my handwriting and my signature, although I have no recollection of writing it. (Reads.)

(The fetter referred to is hereto attached and marked "Exhibit 12.")—Found on page 180.

July 12th, 1876, I wrote Mr. Ru*ben* I. Eaton as follows: (Reads.)

(The copy of the letter referred to is hereto attached and marked "Exhibit 13.")—Found on page 182.

I received a letter written on the 20th of July, 1876. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 14.")—Found on page 183.

On the 25th of August, 1876, Mr. R. *R.* Eaton addressed a letter to Mr. William Holgate. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 15.")—Found on page 185.

September 7th, 1876, R. I. Eaton addressed a letter to William C. Holgate. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 16.")—Found on page 186.

A letter from Hamilton, Canada, from R. I. Eaton to William C. Holgate. (Reads.)

93 (The letter referred to is hereto attached and marked "Exhibit 17.") It is dated September 25th, 1876.—Found on page 186.

The witness produced and read a letter, dated December 1st, 1876, from R. I. Eaton to William C. Holgate, which is hereto attached and marked "Exhibit 19.—Found on page 192.

Letter dated November 13th, 1876, from Mr. Holgate to R. I. Eaton, and the postscript, dated Dec. 7th, 1876, to the same letter, was read by the witness, and the same is hereto attached and marked "Exhibit 20."—Found on page 190.

The WITNESS: I propose here in this connection to put in a letter to J. B. Eaton, dated October 2nd, 1876.

Plaintiffs object to the introduction of this letter as evidence. It is admitted, objection to be ruled upon hereafter. (Reads.) (The letter referred to is hereto attached and marked "Exhibit 21.")—Found on page 189.

The letter I have just given was in answer to the following letter, dated September 28th, 1876, which I swear to be in the handwriting of Mr. J. B. Eaton and addressed to me. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 22.")—Found on page 187.

On the 23rd, 1877, of February I received a letter from J. B. Eaton' received by me, Feb. 26th, 1877. (Reads.)

(The letter referred to is hereto attached and marked Exhibit 23.)—Found on page 193.

Complainants object to the introduction of the letter, and the same is received subject to exception.

The WITNESS: I answered that on the 27th of Feb., 1877, the next day after it was received, by letter dated Feb. 27th, 1877, and addressed to J. B. Eaton. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 24.")—Found on page 195.

94 I have a letter dated the 19th of March, 1877. I received that letter from Mrs. Eaton, which I, having seen her handwriting, identify as her handwriting.

(The letter referred to is hereto attached and marked "Exhibit 25.")—Found on page 196.

On the 24th of March, 1877, and, I suppose, in response to that letter, I wrote Mrs. Eaton. (Reads.)

(A copy of the letter referred to is hereto attached and marked "Exhibit 26.")—Found on page 197.

Here is a letter from Mr. Eaton, on the 21st day of August, 1877. Mr. Eaton wrote me a letter, received Aug. 21st, 1877. I see in the handwriting of my clerk indorsed on it. (Reads.)

(A copy of the letter referred to is hereto attached and marked "Exhibit 27.")—Found on page 202.

Objected to by complainants, as incompetent and immaterial.

Letter dated Aug. 15th, 1874, J. B. Eaton to me. (Reads.)

(The letter referred to is hereto attached and marked "Exhibit 28.")—Found on page 154.

Letter dated June 22nd, 1875, J. B. Eaton to me.

(The letter referred to is hereto attached and marked "Exhibit 29.")—Found on page 163.

Letter from J. B. Eaton to me, dated August 23rd, 1875.

(The same is hereto attached and marked "Exhibit 30.")—Found on page 170.

Letter from J. B. Eaton to me, dated Dec. 29th, 1875.

(The same is hereto attached and marked "Exhibit 31.")—Found on page 172.

Letter of J. B. Eaton to me, dated June 20th, 1877.

(The same is hereto attached and marked "Exhibit 32.")—Found on page 198.

Letter written by me to J. B. Eaton, and dated June 23rd, 1877. (Reads.)

(The same is hereto attached and marked "Exhibit 33.")—Found on page 199.

Letters from J. B. Eaton to W. C. Holgate, dated July 17th, 1877, and reply thereto, July 23rd, 1877, were read by the witness, & the same are hereto attached and marked "Exhibit 34."—Found on page 200.

95 Letter from me to J. B. Eaton, dated Aug. 22nd, 1877, was read by the witness, and the same is hereto attached and marked "Exhibit 35."—Found on page 203.

The WITNESS: I have stated that I was present at the time this contract was made. Before its being reduced to writing by Mr. Holgate, or Mr. Eaton and Holgate, it was then understood between them that I, as Eaton's attorney, write a deed, which should be delivered to Mr. Holgate, pending the time when he should get the

deed agreed upon in the contract—that is, to himself and wife—and I did so. Whether that was done that day, or whether it had been done prior to the actual signing of the contract or not, I don't know. I, however, wrote the deed, in my handwriting, and it was understood between them, and between myself, who was then to have, after that, a part interest, although the contract was not carried out.

Complainants objected to the understanding of the parties being given.

The WITNESS: I will put my language in different form. It was stated between them in substance there, in my presence, and by myself as a part of them, that the deed was to be held by Holgate, although in form of a deed, simply as a mortgage security for all the advancements which he then made, and which would be necessary to make to Adam Wilhelm to pay off this tax lien, until the final execution of the tax contract to Mrs. Eaton; in fact, the arrangement between all the parties was that that should not be recorded. I am quite confident of that now; but, anyhow, the agreement was taken, and it was taken as a mortgage to secure that. I have
96 not seen the deed from that time to this, to my knowledge.

By Mr. HOLGATE*c*:

Question. Just notice the date of the deed and see when it was *dated?* (recorded?)

A. This is in my handwriting. Yes; this is the date (indicating).

Q. What is the date of it?

Ans. July 30th, concurrently with the contract. It is acknowledged on that date; that is, bears date of that date. It is acknowledged before me, as notary public at that time. It was not put on record until July 8th, 1875. At that time $400 was advanced to Mr. Eaton in cash, in this form: Eaton drew money on his loan, signed by us as his securities in the Defiance National Bank, 60 or 90 days; $400 was advanced to Eaton at that time by a loan from the Defiance National Bank, at his request, Mr. Holgate and myself, one or both, I can't say which, going as his security at the bank. We both went. I have the original note in my hands. Out of that $400 Mr. Eaton paid Mr. Holgate the money that I had borrowed of Holgate on his account to pay for those costs heretofore. We had to pay that note off, and did pay it off. It was understood that we had to at the time, and the notes was assigned to us by the bank. There was a tax lien referred to, as being in addition to the consideration in the hands of Wilhelm. To get up that tax lien I drew my check to Adam Wilhelm for $424 dollars and some cents. He already had a deed for it, I think, and what he had paid out subsequently and interest. It was for the actual amount and six per cent. interest that Mr. Holgate stood half of. The payment of this $420 dollars and some cents was the date of his quit-claim to us, whatever it was; it is spoken of in the quit-claim as $420.
97 It was $420 and some cents; but the payment of that money was of the date of that quit-claim deed, or thereabouts.

(The note of $400, dated July 30th, 1874, is offered by the defend-

ants to show payment to Eaton, and is hereto attached and marked "Exhibit 37.")—Found on page 203.

(The tax deed to Wilhelm, dated November 12th, 1874, with certificates attached, is introduced in evidence, and is hereto attached and marked "Exhibit 39.")—Found on page —.

The WITNESS: As I stated, immediately, if not before Mr. R. I Eaton was out there, indeed, before the fall of 1875, the value of that property began to recede; shops had not come there; the company did absolutely nothing for us; not even shanties; but there was still manufactories going there, and through their persistence in not giving us title and talking about their ownership in the land, we lost the sale, in the winter of 1875 or spring of 1876, of land to a large manufacturing concern there, Turnbull & Co., who wanted a portion of it to erect his building, the largest steel manufacturing company in the United States, which came there and located in other places, because they would not take this land in dispute. The firm is Turnbull and Shelley. And had they located there, it would have enabled us at once to have sold at large prices the whole of this sixty acres of land. The land continued to depreciate. The land is cut up with deep ravines; it is what we term there the beeswax claim land, absolutely good for nothing for farming purposes, and good for nothing in the world except some manufacturing interests would go there. Everything has gone the other way. Nothing would locate there, so that the land remains out there in the woods, on one side of the town practically, and unsettled part
98 of the county really, comparatively worthless. It began to depreciate after this down to or before we received that notice of Mr. Eaton not to pay over the money. I refer to the notice from J. B. Eaton for us not to pay him over any money. Long prior to that it depreciated so that we could not afford to pay them near the purchase money.

Q. Do you remember when that was?

A. Well, the letter there shows for itself; long before that it had depreciated. I state right here, while I think of it, that I told Mr. Eaton further at the time of that interview in his attorney's office—Hill & Myers' office—Mr. R. I. Eaton, that on prompt compliance with their part of the contract, that is the execution of her deed, it would be best for his mother to send the notes through the bank; that they would be paid promptly, when due, to the bank, no matter who held them; I also notified him to that effect, and that even after that I told his attorneys there, who were acting for him, Mr. Myers—this was along in the winter and spring of 1875 and 6—that all they had to do to have the notes paid promptly when they fell due—the first would fall due in October, 1875—was just to comply with the contract of J. B. Eaton wholly on their part; I might state, too, that we were always ready and willing and anxious to comply with our part of the contract here until up to such an unreasonable lapse of time that we should suffer loss by it, and we deemed the contract rescinded; we were always ready and willing and anxious to comply with our part of the contract the time we

were ready to sign that deed until after the property had depreciated, as I say, along there in 1876, so that we would meet with an
99 actual loss by doing it; we would not have it under any circumstances, except for the purpose of speculating. The opportunity to sell to Turnbull & Shelly occurred in the fall of 1875 or spring of 1876; and I will state that I never had any conference with Turnbull and Shelly at all; the citizens of the town there were to give certain lands, and it was with the committee that was purchasing the lands that I had the conference with.

Q. State where the lands were located?

A. I did state, I think, that they were located over the other side of the town.

Q. East or west.

A. On the other side of the Auglaize river, and a good mile from this property; I should say a mile and a quarter; perhaps mile and a half.

Cross-examination by Mr. WILLEY:

How long, Mr. Newbegin, had you been attorney for Mr. John B. Eaton before you made this contract, or before this contract was made with Mr. Holgate?

A. That contract was made July 30th, 1874; I could not say that I was acting as his attorney properly till the question again came up about the sale of that portion of the land that was condemned by the railroad; that was, I think, sometime, in 1872; but we had had correspondence from Cincinnati a year or two preceding that in regard to this old Van Pelt suit, and for some cause or other Mr. Eaton got dissatisfied with his attorneys and wanted me to watch them; I told him that was something I did not want to do; I told him when he would discharge his attorneys I'd take their place.

100 Q. He had a mortgage on this property?

A. His wife had a mortgage on this property, and that suit I know was begun in 1868. There was a man by the name of Van Pelt had a mortgage against Weisenberger, and this mortgage, held by Mrs. Eaton, was against the same grantor, Weisenberger, and in that same suit Eaton had Hill & Myers as his attorneys, who brought and set up their mortgage by her own cross-petition. I say that suit was begun in 1868; what time it came to sale and bid in by Eaton I don't know.

Q. You knew the fact, did you not, that this mortgage being set up in that suit was a mortgage that belonged to Mrs. Eaton?

A. No, I did not know that until I saw Eaton out there at Defiance, in 1874; I had learned of it in 1874, about the time of this contract; I knew it at the time this contract was made; that is the reason why I would not buy directly; Mr. Holgate did not know it; I knew it.

Q. You knew the fact that the mortgage ran to him in trust?

A. Well, I think as a matter of fact the mortgage did not run to him in trust.

Q. I think it did.

A. I should not be convinced of that without seeing it, Mr. Wil-

ley; I think the mortgage was to a man by the name of Bartley Campbell.

Q. Then it had been assigned to him in trust?

A. I ain't sure whether it was assigned to him or to Allen; I think the mortgage was assigned to Allen, the mortgage and notes, and by Mr. Allen bequeathed to Mrs. Eaton; I think that is the way it was, but I am testifying in the dark; I can't pretend to say.

101 You knew the fact that at the time the contract was made with Mr. Holgate that this mortgage—that this property was Mrs. Eaton's?

A. No. I merely knew this: that Mrs. Eaton claimed some in interest in those notes or mortgages that had been foreclosed there; that is the extent of my knowledge; what it was I did not know.

Q. But I understood you to say a minute ago that you knew that the mortgage was Mrs. Easton's?

A. No. I did not mean to say that; if I did, I misunderstood your question.

Q. What did you mean?

A. I meant that in regard to the claim of Mrs. Eaton that she claimed some interest in that mortgage.

Q. Didn't you hear Mr. Eaton say that it belonged to his wife; that it was his wife's property?

A. No, sir, never; in fact he always claimed he had good title to that; he claimed that he had advanced on her account, as trustee, more than that land was worth.

Q. At the time you made this deed, did you make out the deed from Eaton to Mr. Holgate?

A. The first deed?

Q. Yes.

A. I wrote it; it is in my handwriting.

Q. You did not write the contract?

A. No, sir; I don't think I was present when the contract was written; the contract was written by Mr. Holgate; I see it is in his handwriting.

Q. You saw the contract at the time the deed was made, didn't you?

A. I can't say that I did; I have no recollection about it;

102 I knew though what the terms of the contract was.

Q. Why wasn't a mortgage drawn instead of a deed?

A. Simply because Mr. Holgate claimed that he would not have nothing to do with the title to the property further than his contract called for, till Mrs. Eaton divested herself of whatever claims she had there; he did not know what they were.

Q. My inquiry is, if this deed was intended as a mortgage simply for $400, and the tax title was spoken of, why wasn't it so expressed and drawn as mortgage instead of a warranty deed?

A. I don't know; I have no recollection now.

Q. Have you any recollection of knowing, at the time, that the contract does provide for the contingency when that deed should be regarded as a mortgage?

A. The contract was silent in regard to that, and I have no further recollection of it.

Q. You think the contract is silent?

A. Yes; of when the deed should be regarded as a mortgage.

Q. Don't you recall the fact that the contract provides that in case he should elect not to take the property, that then the deed should be regarded as a mortgage?

A. I don't recall that now in the contents of the contract; I will see it.

Q. Were you aware of the deed that has been shown here being sent on by young Eaton to defiance?

A. There has been no deed shown that I recollect of.

Q. Have you any recollection of ever having seen that deed?

(Handing deed to witness.)

A. I presume this is the deed that I saw; I take it to be; I saw this one, or one like it.

103 Q. Do you remember from whom it came?

A. My best impression is, I don't remember from whom it came; I have no doubt though that this deed came from Mr. Rufus I. Eaton.

Q. Did it come to you or to Mr. Holgate?

A. I don't know; my best impression is that Mr. Holgate brought this deed into my office; it is possible that it came to me and I handed it to him for inspection; my best recollection now is that he brought it to me.

Q. You understood it to be a deed that had been sent down as a tender; it was a tender to you?

A. O, yes; there was a letter; I have got the letter now; I don't know where it is.

Q. Stating that it was a deed tendered under that contract?

A. Yes; that was intended to be such.

Q. And you and Mr. Holgate decided to send it back?

A. Well, I decided very promptly to send it back; I recollect that; I can't say what Mr. Holgate did.

Q. Who did send it back, you or Mr. Holgate?

A. I take it from an indorsement on it that Mr. Holgate sent it back.

Q. Is this all unimproved property?

A. Entirely so; I might correct that last answer to this extent; I don't think I have seen the property for over three years; it formerly had been cultivated in a rough way, and some young trees set out on it, which are all dead now.

Q. Well, at the time it was bought in 1874?

A. Well, this was the condition of it that I am describing at that time, and it had grown up; there were no fences around it;

104 it was used in common there for the cattle of the village that strayed out there to pasture on, and had grown up, the pasture considerably to bushes.

Q. There were no structures on it of any kind?

A. None at all; no fences on it; the fences were all down; there

had been fences on it; there was a line fence between them and the other track towards the village, and the railroad company have a fence; it runs out to the Wabash railway line, and it runs on the easterly side to the canal. Their fence is all down there on the side of the canal, and also, whoever owns on the westerly side or southwesterly, the fence was all down there; two sides of it there was no fence.

Q. I want to know whether you or Mr. Holgate, at the time the contract was made by him, ever occupied any portion of it, or used any portion of it, or realized anything from it?

A. We never occupied any portion of it, we never used any portion of it, we never realized anything from it except as a matter—I have forgotten. Mr. Holgate undertook immediately after the purchase to lease it to a man by the name of Warren for three years; I think fifty dollars a year. This is more my understanding than anything, and this Warren agreed to take charge of it for three years, I think, for fifty dollars a year—put up fences. He never did anything, never took possession under it; but Mr. Holgate tells me today that he thinks he paid 850.

By Mr. HOLGATE: No. It is 825.

The WITNESS: Well, 825 then. I know that it has never
105 been occupied by anybody; I know that actually; no fence, no nothing, unless it has been pre-empted, and somebody got title by way of squatter sovereignty lately.

Q. What is that property worth now?

A. I don't think that property is worth now to anybody cash to exceed 1,500 to 1,700 dollars to the outside, for any purpose in the market to buy. I am excluding now the relation of the piece condemned by the railroad, of course.

Q. Well, the piece condemned by the railroad is simply for the right of way?

A. No, sir. It was 15 acres for stock yards and things of that kind, but it has never been used only about three acres of it; it never has been occupied for any purpose whatever.

Q. Still it was condemned by them, and paid for by them?

A. Yes.

Q. Wouldn't you consider that gave them a pretty fair title to it?

A. No, sir; I do not, only just for railroad purposes, when property is appropriated it is appropriated for railroad purposes, and if not used for that it reverts to the original owners; that is my opinion.

Q. Then your idea is that all of that 15 acres, except what has been occupied, could be resumed?

A. I should think it could by the person holding the title, the railroad might spread themselves over it, if the attempt was made to get it, but in time they might.

Q. I was inquiring because you had spoken of a reversionary interest, and I want to understand what you mean?

106 A. That I consider the real reversionary interest there more valuable than all the rest of it put together, the locus or situs

of that land, if he could be invested with it, would be of more benefit to him.

Q. In regard to the value of the land you spoke of, the cash value of the land?

A. Yes, sir.

Q. Would you give any higher estimate of value provided the land was sold out on time?

A. Well, yes; the cash value, though, is the real value of the land; that is what I was testifying, with 6 per cent. interest there with us up in that vicinity, with a third down, lands would sell for more than they would for cash.

Q. How much more would this sell for, as nigh as you can estimate?

A. If it was worth $1,500 cash it would probably sell for $1,800 on those terms.

Q. Would sell for a fifth more?

A. Ten to fifteen per cent. more so; I testify more in regard to the terms of sale back two or three years; but the cash value I am fixing at this time.

Q. What was it worth in 1877, this land?

A. O, well, it wasn't worth more in 1877 than it is now. Mr. Eaton, however, when he was out there, said it was worth $300 an acre.

By Mr. KINGSBURY:

Q. You say you decided very promptly to send the deed back, now you can state the reasons why you decided to send it back.

A. There were two reasons in my mind; one was that under no circumstances would I acknowledge by an acceptance that we were under any obligation whatever upon that contract.

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Q. What was the next one?

A. The other was that the original contract called for the whole land, including the part appropriated by the railroad, and that deed did not give us the reversionary interest, as I have stated, of the parties.

Q. Is this the deed that was signed by you, or a copy of the deed that was signed by you to them, enclosed with those letters and the mortgage and notes? (Indicating.)

A. Well, I can't swear, without seeing the deed that I sent, as to what was in the one that I sent; I will swear, though, that that is not the deed that I sent; whether it is intended to be a copy from that or not I can't say now.

Q. What is there that is omitted there?

A. Well, I am quite confident that in the deed that I sent to be executed the reversionary intent was retained so far as the description was retained, not in the warranty part however; what was in that deed now I must state I have not the slightest recollection; I don't know from my own knowledge; I have not the slightest recollection what was in the deed that I sent, only that I sent one, and that that is not the one; I know that is not the one.

Q. Mr. Eaton, you say, made some claim in regard to the notes

and mortgage himself; do you remember how much that claim was, the amount of it, the original notes and mortgage?

A. He claimed the whole purchase money as coming back to him—the whole of it; the consession by him that we might deliver her the notes and mortgage was upon the condition that she execute the deed at once as an inducement for her to comply with her
108 part of the contract; that was afterwards withdrawn, as I said.

Q. Now, when this condemnation proceeding—in regard to this money, you have stated that in the condemnation of a portion of this land for which money was paid into the probate court.

A. I stated at the time that was conditional back in 1874; that was, she should execute a deed in response to sending them to her. Mr. Eaton and I talked that over in our own office—J. B. Eaton.

By Mr. Hoyt:

Q. I'd like to ask when the first conversation that you had with Mr. Eaton, if you had one, in regard to his withdrawing that third pay—that $3,000 to Mr. Eaton—when was the date of it, and where did it occur?

A. It was in my office, the first conversation I had; the first and only one was in my office, long prior to the time that it was sent; at the time that this money was paid over he was out there again when the money was paid. It was then withdrawn, and, as I said, it was a condition precedent that she should sign it at that time; it was only on that condition that she should execute a mortgage that she might have the money—execute a deed, I mean.

Q. And the only conversation you had in regard to that happened just before you sent the note and mortgage on?

A. No; I say subsequent to the time this appropriation was decreed by the court; we then had further conversation in regard to it; that was some time in 1875.

Q. Do you remember what part of 1875 it was?

A. Well, along in summer; I should think in June.

Q. But it was at the time the appropriation money paid over by the railroad was paid to him?

A. Yes; it was at the time the appropriation money was paid over.

109 Q. You had no conversation with him on the subject subsequent to that?

A. I had but two conversations with Mr. Eaton in regard to that, that I remember of; one previous to the sending of the notes and mortgage, and that was the condition that I named; the other subsequently, after the court had decreed that that money was his, and I can't state the exact time; I don't know whether it was paid to him by draft or not; I think I drew the money out of the hands of the probate judge, and afterwards sent it to him by draft.

Q. If you sent it to him by draft how could you be present and have personal conversation with him?

A. Haven't I stated that I was there at the time of the decision,

and did not draw the money out immediately, but sent it to him subsequently by draft.

Adjourned until June 25, 1881.

JUNE 30*th*, 1881—10 a. m.

All parties present, and hearing resumed.

WILLIAM C. HOLGATE, called by the defendants, and being sworn, testified as follows:

By Mr. KINGSBURY:

Q. State your name, age, residence, and relation to this suit.

A. My name is William C. Holgate; I reside at Defiance; my age is in the neighborhood of sixty-five; I am one of the defendants in this suit.

Q. You may state your connection with Mr. J. B. Eaton in this transaction that is made the subject of this suit.

A. About the winter of 1874 I was passing the court-house in Defiance and heard the sheriff make the announcement that
110 he would sell the lands described in the petition on execution issued in the case where, I think, one Van Pelt was plaintiff and G. M. Weisenberger, John B. Eaton, and others were defendants, and a judgment had been obtained, I was told the sale was on account of delinquent costs that had been taxed against John B. Eaton, one of the defendants, in favor of the sheriff, clerk, etc., that were a lien upon these premises. I understood that the property was likely to sell at a great sacrifice. Seeing Mr. Newbegin passing from his office to the Defiance National Bank, I passed over to him and inquired of him about the matter, and was told by him that the property would undoubtedly sell; that he had written to John B. Eaton, and had received word within a day or two that he could not be there; that he could not be in Defiance under some two or three months from that time; that he had no money in his hands to pay the costs belonging to Mr. Eaton; that Mr. Eaton, I think, requested that he should borrow some; that he did not know whom to borrow it of; and thereupon I asked him the amount; my impression is it, all told, was between one and two hundred dollars, something over one hundred dollars—the sheriff's, clerk's, etc.—and I made the remark to him that I thought it was a pity that that property should be sacrified in that way, and told him that I would advance him the money to stop the sale—loan the money to him on behalf of Mr. Eaton—to prevent the sale of that property; and as the sheriff was crying it, he accepted my proposition; I drew him a check upon the bank; he passed right over and told the sheriff he was ready to pay the debt off, and stopped the sale. About two or three
111 months, perhaps four months, after that Mr. Eaton came to Defiance, and after being there a few days called upon me and expressed his thanks to me for taking the course I did to prevent the sacrifice of the property, stating that he was impressed with the idea that there were some parties trying to get it from him at a mere trifle, and saying that he was under the necessity of sell-

ing it, and he thought there was a good deal of a bargain in it at the price that he would sell it at, and he would be glad to have me have the advantages of the bargain, on account of the course that I had taken. About this time it was expected by some, and by Mr. Eaton amongst others, that the Baltimore and Ohio Railroad Company would locate their shops there at Defiance, and he and some others had, I thought, quite a high estimate on it—rather an overestimate—so much so that I told him, after hearing his price, that I would prefer that he would sell it to other parties; that I did not wish to buy; that I thought it was quite doubtful whether the shops would be located there; that if they were located there it would not be an unreasonable price, but if they were not, it would be rather a high price. He stayed about the place, I should think, perhaps two weeks, I occasionally meeting him—and, by the bye, I will say here it was the first time I ever did meet him or know anything about him at all—and finally he came to me and said that he could not well repay me the money I had advanced, unless he made that sale, and that he could not find a purchaser satisfactory, and that it was necessary for him to return home, and it was necessary for him to borrow some money to enable him to get home, and he wanted to know if I would add to the advancement that I had already made, and take a lien upon this property to secure me until he could get home and get the money. Well, I considered the
112 matter some, and finally concluded to add, on his request, to what I had already advanced to make the sum of four hundred dollars, the four hundred dollars referred to in the papers, and let him have money to that amount, and as a security for that money entered into the agreement which is set out in the petition, which combined not only a security for the money, but also a right on my part, within a certain time, to purchase the property of him at a sum named there, which he was asking for it—I think within two months or so after that. At the time that he took this money and this agreement was made he made me a deed, a straight deed, as a mortgage security for that money. It was understood between him and me, and I think by the terms of that contract, that in case I should conclude to purchase he would substitute another deed, to be executed by himself and his wife. The application to me was for a loan, and I took it under advisement. I became rather, I will say, friendly towards Mr. Eaton from my intercourse with him to this time, and for his acknowledgment to me for the course that I had taken with regard to cutting these individuals off from sacrificing his property, and I was disposed to let him have some money; I thought he needed it; he seemed to be out of money to get home with, and finally agreed to, and entered into this contract for the purpose of securing me. And again I will say here, that I did not know but that the machine shops might be located there; something might arise by which there might be an advantage in buying at the price that he asked, and I took the refusal, you might say, by virtue of the terms of this agreement. My recollection is now of this that I took a refusal of
113 the purchase up to such a time, two months, by virtue of this agreement. That is my recollection about it. I have not

read it in five years. It might be well enough for me to read this contract over, perhaps, here to refresh my mind a little, (reads.) The application was for a loan. The study on my part was how best to secure that loan. It was taken under advisement several days how best to secure this loan, and this paper was got up in that shape and a deed taken, which I deemed was a good and a proper course, and which is a very common course with me, to take an absolute deed on its face to secure a loan in the place of a mortgage, a very usual and common practice up our way. I will state that afterwards, at about the time limited by this contract, I informed Mr. J. B. Eaton by letter that I would regard this as a complete sale and trade, provided that he and his wife executed the deed and sent it on.

By the COMMISSIONER:

Q. Is that letter here?

A. I have not the letter, but I gave him to understand that we would regard that as a trade, provided he and his wife signed the deed and sent it on to substitute in place of the other. The time elapsed; there was no deed sent in place of the other, and we were desirous of having the title in shape so as to enable us to dispose of the land. Mr. Newbegin coming in and taking a part interest with me afterwards, we concluded to send a deed, at the instance, I think, of John B. Eaton. He suggested that we might do that—send our notes for the balance of the purchase money, which was $3,000, to his wife, and a mortgage to secure them, which we did, enclosing in connection with those notes and mortgage a deed for her and her husband to execute and return to us. That was in 1875.

114 This contract was made in 1874, and it was the next spring, 1875, that the notes were mailed to Mrs. Eaton—the ones that are sued upon. There were two notes, of $1,500 each. They were sent in the spring of 1875, and in the same envelope that enclosed the two notes, and the mortgage to secure those notes was a deed for her and her husband to execute to us, in order to fulfill the contract that I have just read. Early in the summer, I think it was, of 1875, I mailed the notes that are sued upon, and the mortgage to secure them, executed by Mr. Newbegin and myself, and also a blank deed, directed to Mrs. Elizabeth R. Eaton, requesting that she would execute that deed and send it on, so as to close up the matter. Within a short time after mailing this to her I received a letter from her, which I hold in my hand.

(Letter referred to introduced, marked "Exhibit 40," and hereto attached.)—Found on page 169.

I think there was correspondence during that season, 1875, through that fall and that winter, up to the spring of 1876.

By Mr. KINGSBURY:

Q. Are there any other letters aside from those that have already been introduced in evidence?

A. Most of that correspondence is in; I put it in the other day; most of those letters (indicating this): that we were still urgent that she should execute that deed, through the summer and fall of 1875

up to the spring of 1876. We were urgent for the fulfillment of that contract, performance of it, as Mr. J. B. Eaton had made with us, and rather urgent that it should be fulfilled. There was, I think,
115 about the fall or winter of 1875 or spring of 1876, an extensive factory, parties proposing to locate a very heavy and extensive factory there, at Defiance, and I was called upon to know on what terms that property could be secured, and was urgent that Mrs. Eaton should execute the deed up to that time in order that we could make it available, and make arrangements with those parties for the establishment of that factory; but she continued to neglect and decline to execute the deed, running on, I think, till about June, 1876, or a year after it was sent there, when, in conversation with Mr. Newbegin, I learned from correspondence through him that she was disposed to refund our money—give us back the money, and so on, in case we released our rights in the property, and I thereupon wrote her to the effect that I was ready to do that; that I was then ready to receive back the money, with interest, which we had advanced to Mr. Eaton, and also which we had paid Mr. Wilhelm for the tax title upon the land—receive that, and drop the matter. That was about a year after these deeds and the mortgage had been sent on. About this time that factory, for the want of power on our side to give a satisfactory title, was located on the other side of the town, about a mile and a half distant, right in the reverse direction. That was a very large factory, has had the effect to build up a village around it, employs three hundred hands, and it really drew the business of the town right in a reverse direction from there. The land very much declined in value, and we concluded that we were under no obligations to take it under the contract on account of the *laches* on their part in executing the deed; and we so ex-
116 pressed our wishes to receive our money back and interest, and drop all idea of future purchase of the land. This was along in the early part of 1876. I think my letter to that purport is already on file here to Mrs. Eaton, which was allowed as being a letter that was sent to her along in about June, 1876. There was no desire or wish ever after that expressed by me, and I don't know of any having been expressed by Mr. Newbegin, to have title given to the land, but a wish to have our money returned, with interest; that the delay had been such as to do away with any right or claim they had on us for the purchase of the land. About December 8th, perhaps the 7th, I received a deed executed by Mrs. Eaton and her husband. I think this is the deed. Within ten hours or twelve hours after the receipt of that deed I mailed it right back.

Q. That is your indorsement on the back of it, is it not?

A. Yes, I believe so; I mailed it right back stating that the deed was too late; we gave them notice to send the *money* in June; this deed came in December and was returned promptly at once with a letter accompanying it, I think, I don't know; I don't think there was any letter accompanying it; I think that (writing on back of deed) is all the letter there was.

Q. Did you ever see Rufus I. Eaton in connection with the matter?

A. I think, I never did.

Q. You said that the Turnbull & Shelley factory was located a mile and a half from this spot. You may state on which side of the river it is located?

A. This land is situated, I should think, in the neighbor-
117 hood of a mile and a half west to the court-house—mile and a quarter to a mile and a half. The Turnbull and Shelley factory was located about a half a mile east of the court-house. I said that I thought that the Turnbull and Shelley factory was about a mile and a half from the land, perhaps that is about the distance but I should think it would come nearer two miles than a mile and a half, right on the opposite side of the town.

Q. And on which side of the river from this land?

A. Well, it is on the east side of the river and the land is on the west.

Q. You may give the master here an idea of how much the town has been built up there in that neighborhood.

A. Well, I made the statement that there has quite a village grown up there, right around that factory—quite a large village, probably of a thousand people—eight to ten hundred inhabitants; grown right up where that factory is located. It operated right against the other side of the town.

Q. State how it is in the immediate neighborhood of this particular land.

A. Well, prior to 1874, perhaps as early as 1872 or 1873, the town grew up and buildings were erected more about this land and the prospects were better than they have ever been since. They have ever made applications—parties that built around the Baltimore depot there—to move their empty buildings down town. They got the impression that the centre of the town was going there, and found themselves mistaken; property declined there very much from what it was about the time of the location of the Baltimore depot in that quarter?

118 Q. You may state whether, at the time of the arrangement with J. B. Eaton, there was a demand for lots and lands in that vicinity or not?

A. There was; there was an impression that the shops would be located there at that time, and there was a strong hope on the part of all in that neighborhood that they would be located there, but they were not located there, and the property declined after it was known that they were located at another point.

Cross-examination by J. H. Hoyt, Esq.:

Q. You say that along in the spring of 1874, as you were passing by the court-house, you heard the sheriff crying this land?

A. Either in the winter or early spring; yes, sir.

Q. Now I want to ask you whether, at the time you purchased this land of Mr. Eaton under this contract, you had made any examination into the suit under which he got title?

A. I had not.

Q. I will ask you whether you knew of the state of that suit, as to who were parties or not, at that time?

A. No; I did not.

Q. Is it usual for you to purchase land acquired under a sheriff's deed without any examination into the suit itself?

A. Probably, before completing and paying all the purchase-money, I should have a pretty thorough investigation.

Q. But at this time you had no investigation made?

A. No; I had not.

Q. You did not know then who were parties to that suit?

119 A. Well, I ascertained that afterwards, who were parties to the suit, and have named them; but I did not at the time know who were the parties: I simply was informed—well, I heard the sheriff making proclamation, as I have stated, and he reads the title to the suit; I caught the names of the parties; I remember that Mr. G. M. Weisenberger owned the land formerly and mortgaged it, but as to the details, as to the history of that mortgage, and who was the owner of it, and all this, I knew nothing about it.

Q. Well, you know now who were the parties to the suit, don't you?

A. I do; and have stated them.

Q. Was Mrs. Eaton a party to the suit?

A. She was not; John B. Eaton was party.

Q. Was he a party to the suit personally, as a defendant or as a trustee?

A. He was named as defendant; I did not see any trusteeship.

Q. You have made an investigation since, and know the status of that suit; now, I want to know?

A. I have not made an investigation since, any further than find the title to it.

Q. Then you don't know positively as to whether Mr. Eaton, as trustee, was a party to that suit or not?

A. Not as trustee; I don't know anything about that.

Q. You don't know whether he was or not?

A. Not whether he was as trustee; I know his name was in the title of the suit—"John B. Eaton."

Q. But you will not swear that it was John B. Eaton simply, and not as trustee?

A. No; I will not; I will not swear as to the details, because I have not read the pleadings.

Q. When did you first learn that Mrs. Eaton and her chil-

120 dren claimed some title to this property?

A. Well, I don't know as I remember exactly. Simply what I knew about that was perhaps some talk and rumors.

Q. When was it that you first heard those rumors?

A. I understood from parties that I relied on, that Mr. Eaton had good title to that land.

Q. That is not the question. I am merely asking when you first knew that Mrs. Eaton, or her children, claimed some title to that land?

A. My impression is that this letter of hers gave me the first positive information about that.

Q. Do you swear positively that at the time this contract was signed—that is in July, 1874—you had no suspicion or notion that there was any claim set up to the land by Mrs. Eaton, or any of her children?

(Objected to.)

A. I can't say that I had any definite idea.

Q. Can you say that you had not?

A. My impression is, that I had not, at the time I made that contract, an idea that Mrs. Eaton, or her children, had claims upon that property as their own property.

Q. That is not the question. The question that I put to you is, as to whether, at the time this contract was signed, in July, 1874, you had any suspicion of any claim being made by Mrs. Eaton, or any one else to that property?

A. I knew that Mr. John B. Eaton had title to that property; I knew that that title would not be regarded as a good, clean title without the signature of his wife, and I supposed a property worth $5,000 to $6,000 would be good security for $400. That is about the position I was in.

121 Q. I want to know—and you can answer the question by yes or no—whether at that time you had any suspicion, acquired from whatever source, that Mrs. Eaton, or her children, claimed any title to that property?

A. My impression is I did not have any suspicion.

Q. Now let me ask you whether you had any suspicion on that subject, or any information on that subject, before the first day of October, 1874?

A. I will say this, that I had no knowledge; there were, perhaps, some rumors that the wife would object to signing the deed, or something of that kind; some rumors; but no——

Q. In other words, there were some rumors at that time that the wife claimed something in the property?

A. But I had no knowledge from any source that I deemed reliable.

Q. Well, it does not make any difference whether your knowledge was reliable; that is not the question. I am asking whether you had any information or suspicion that Mrs. Eaton made any claim to that property prior to October 1st, 1874?

A. Well, I think I did not; I think I would deal as I would with any other husband about property.

Q. When did you first hear these rumors that you have spoken of? You say that you heard of them prior to October, 1874. Had you not heard of them prior to July?

A. I don't say that I had heard of them prior to that, I said that I heard some rumors, but I could not say whether they were prior or after.

Q. Had you heard any rumors before this contract was signed?

A. I heard no rumors from any source that I thought——

Q. That is not the question I am asking you, sir. I am
122 asking you whether, at the time this contract was signed, you had heard any rumors at all in regard to any claim made by Mrs. Eaton? Now, that can be answered plainly by yes or no.

A. Well, I will say no; I think I did not.

Q. But you will not swear you did not?

A. Well, sir, you might ask me about a thing that occurred five or six years ago, what was in my mind, in my general dealings or transactions, and I hardly think I would swear positively to anything; I would give my impressions about it now.

Q. But your impression is that on or about the first day of October, 1874, you had heard rumors as to that?

A. Well, I am disposed to think I had not heard rumors.

Q. You testified that at or about that time, you had from some source that you did not think——

A. Well, I said it might have been that I had heard something about that time, and it might have been after that time; my impression is that it was after that time.

Q. Now, as a matter of fact, you have learned since, that during all this time Mr. Newbegin knew that Mrs. Eaton made some claim to that property, have you not?

A. Well, I heard more from his testimony than I ever heard before.

Q. You know, as a matter of fact, that during all this time Mr. Newbegin knew that Mrs. Eaton made some claim to the property?

A. Well, I did not know it until I heard him testify here.

Q. Well, you know it now?

A. I know what he has testified to.

Q. I want to ask you whether Mr. Newbegin, from July up to Oct., acted as your attorney?

123 A. Well, my attorney as to what? In this case?

Q. As your attorney in anything?

A. I don't think he ever acted for me, excepting I, as administrator of another estate, sometimes turned business over to his hands that I could not attend to myself; he was the attorney that I usually employed prior to that, and after it when I had business to be attended to; that is, for other parties.

Q. But did he do any business for you during that period?

A. My impression is he did not.

Q. Did he do any business for you prior to July, 1874?

A. I don't think he ever did any business for me personally, only when I had more than I could attend to, I would pass business to his hands that was entrusted to me by other parties; I think I always attended to my own business pretty much.

Q. I will ask you, if you please, when you first knew that the railroad company were not going to locate their shops there?

A. Well, if you will allow me to ask Mr. Newbegin where they located them at the town of Garrett, I could tell you.

Q. No, I want you to testify.

A. I will say this, that I didn't know that they had stopped the idea of considering that as a point for their location until I heard

they were located at the town of Garrett, and just what time that was I can't remember.

Q. Do you swear that in July, 1874, when you signed this contract with Mr. Eaton, you believed that the railroad company were going to locate their shops on that land?

A. Well, I had no idea that they would locate them on that land; they owned a hundred and forty acres a little above there, that they had bought a little preceeding this, a little above this
124 land, and I thought very likely they might locate them on that land; I talked with the officers of the railroad in reference to it, and they had the matter under advisement, and made the remark to me—the chief managing officer—that he was thinking of making a proposition to us to make a donation of about $20,000 and forty acres of land for the location there.

Q. When was that?

A. Well, that was about a week before it was located at Garrett.

Q. And you don't recollect when it was located at Garrett?

A. That is a place about forty miles west of us.

Q. You don't know when it was located there?

A. I don't remember the date; he made the remark that they would be very large shops; that they would increase the population of the town at least twenty-five hundred within a year.

Q. When do you think it was that they located at Garrett?

A. Well, my impression is that it was some time after this.

Q. Some time after July, 1874?

A. Yes.

Q. How long?

A. O, it might have been over a year.

Q. And it might not have been over a year?

A. Yes; it might not have been over a year.

Q. Will you swear that it was after July?

A. I won't swear to the time without I look at same dates. It is a matter of public record; you can get at it.

Q. (Handing letter to witness.) That is your letter, I suppose, isn't it?

A. Yes, sir; that is my letter.

Q. When was it that you received the deed from Mrs.
125 Eaton which you sent back?

A. My impression is that I received it about a day before I sent it back.

Q. When was it that you sent it back? Have you any means of telling?

A. I can tell by looking at the deed; this was sent back Dec. 8th; I think, 1877, it is marked here; 1876 it ought to be, I guess; yes, I think it was in 1876; that date "1877" is a mistake.

Q. I want to ask you whether, prior to the time that you sent back that deed, you ever informed Mr. Eaton that you would refuse to abide by that contract?

A. Why; you have a letter on file.

Q. I am asking you that question: that is all, outside of letters, I want to know about it?

A. I never saw Mrs. Eaton.

Q. I want to know whether you ever informed her by letter or otherwise?

A. I informed her by that letter, as I understand it—the construction I put upon it.

Q. And do you remember the date of that letter?

A. Some time in the early part the spring or summer of 1876, I think.

Q. Was that a letter to Mrs. Eaton, or was it a letter to Mr. Eaton?

A. It was a letter to Mrs. Eaton; I think you will find it in June, 1876.

Q. I will ask you whether this is the letter that your refer to?

(Letter shown witness.)

A. I think this is the letter I refer to—June 13th, 1876—this is the date; that is the first indication that I gave Mrs. Eaton that we would settle the matter in that way.

126 Q. Did you give Mrs. Eaton any other indication until the time when you sent the deed back?

A. Why, I waited patiently for Mrs. Eaton to respond to that, and got no word from her at all. I never received any word from her again, nor had any further correspondence with her. She did not reply to that letter at all.

Q. Between June 13th, 1876, and the time that you sent back that deed, did you write any letters to Mr. Rufus I. Eaton rescinding the contract?

A. Well, you just showed me some of those letters.

Q. I showed you one of those letters. This letter is dated Nov. 13th, 1876; but there is a postscript which shows that it was not mailed until December 7th, 1876. Is there any other letter that you wrote, except those two, re-cinding the contract, before you sent back the deed?

A. I don't remember anything of any importance. They are in here; there may be some other letters put in here. If there are any, I think I have them in. I handed in here, I think, on the other examination. My impression is that I handed in all the letters that I had, pretty much. There might have been some notes or something passed between us besides those.

Redirect examination:

By Mr. NEWBEGIN:

Q. You say that you knew that the shops were located at Garrett about a week after this conversation with the manager of the road. Did you know at the time, or afterwards learn it, that they were located there?

A. I afterwards learned it.

Q. You learned the fact that they were located a week afterwards subsequently?

A. A week after the conversation with the manager of the

127 road; but with regard to the date, I couldn't tell you the time that that conversation took place, without referring to some minutes. I could tell if I was at home.

Q. You say you may have heard that Mrs. Eaton had some claim. Did not that first come to your attention from Mr. Eaton and myself at the time or after the contract was written?

(Objected to.)

Q. If you learned it at all, whence did you derive the information; whence did you first, in other words, derive any information as to Mrs. Eaton, or any of her children, or anybody else, except Eaton, having any claim upon that land?

A. I think I made the remark that there was some rumors afloat in the town. My impression now is that I heard Adam Wilhelm talk about the matter. He had been trying to buy it.

Q. The man that held the tax title?

A. Yes.

By Mr. HOYT:

Q. When did you hear him speak of it?

A. I think I heard him express something to the effect that the woman would make trouble, or something, some time, and I can't tell exactly when; but I knew that he was trying to buy the land, and I did not take to heart very much what he said—didn't let it influence me.

Q. Was it before the date of the contract that you heard Adam Wilhelm say that?

A. I think it was not before the date of the contract.

By Mr. NEWBEGIN:

Q. What conversation, if any, had you had with Eaton as to Wilhelm wanting to purchase that land?

A. I considered, so far as Adam Wilhelm's remark was con-
128 cerned, he was seeking to buy that land himself, and his habit is to bluff others. It did not have much effect on me, one way or the other.

Q. What conversation, if any, had you had with Eaton, at or prior to the time of the making of the contract with him, as to Adam Wilhelm's wanting to buy that land?

A. Well, I got the impression that he thought Mr. Adam Wilhelm was trying to get it away from him for little or nothing.

Q. Mr. HOYT: The question is, What conversation did you have with Mr. Eaton? not what your impression was.

Q. Had you had any talk with him on the subject?

A. Why, he came to me and told me that he was trying to sell it. I think he was trying to sell it to John Rowe, and was trying to sell it to perhaps——

Q. Was there anything said about a syndicate being formed there to purchase that land? If so, you may name the members of it.

A. There was an impression that Kavst was mixed in it, and Wilhelm and Rowe in the partnership.

Q. Tell who Kavst was.

A. Kavst was the sheriff, and he was the one that was offering that land.

Q. Offering the land at the time that the execution was out for costs or the order for sale? Is that the time you mean; offering the land at that time?

A. Yes; or trying to buy the land.

Q. How was it as to Hill; of the firm of Hill & Meyers, being mixed up with that?

A. Well, Hill was friendly with those parties, particularly so.

Q. And who were attorneys, if you know, for J. B. Eaton
129 in the cross-petition foreclosing that mortgage against Weisenburger?

A. I understood Mr. Hill, chief attorney, principal attorney—Hill & Meyer.

Recross-examination:

By Mr. Hoyt:

Q. Then you knew before the date of the contract that Mr. Hill and the sheriff, and one or two other people there whom who have mentioned, had stated that Mrs. Eaton had some claim to the land, or made some claim to the land, did you?

A. I did not say that.

Q. Well, now is that, as a matter of fact?

A. Well, my impression is that I didn't know that.

Q. You have stated that you did not rely on these statements that were made in regard to the claim of Mrs. Eaton, because they were made by persons who were endeavoring to purchase the property; is that so?

A. Yes; but that was afterwards.

Q. That was after you purchased the property yourself, was it?

A. That was after I made the loan of that money.

Q. That was after the date of the contract, was it?

A. That is the time I loaned the money—part of it.

Q. Then prior to entering into this contract of sale, you knew of no remarks being made by any of these men in regard to a claim set up by Mrs. Eaton?

A. I think that I had no knowledge——

Q. Just answer that question, if you please.

A. Well, you wait till I get around to the point and the answer will come, probably. I wish to answer the question according to the best of my recollection. I think I had no knowledge of
130 any claim to the full title to that land by Mrs. Eaton until the time that she wrote me to that effect, although I knew she had some rights there; there might be dower rights; there might be some other rights.

Q. When did you know that she had some rights there prior to the date of this contract?

A. When I learned that she was Mr. Eaton's wife I knew she had some rights there.

Q. When did you learn that she was Mr. Eaton's wife?

A. Well, I understood that Mr. Eaton had title to this land, and that he had a wife, & and that Elizabeth R. Eaton was his wife.

Q. And you knew that at the time of the signing of the contract?

A. Yes; I probably understood it at the time I drew up that agreement or I would not have required her to sign it.

Q. Now, I will go back and ask the question which I asked before, and which I think was not answered. Prior to the date of that contract did you know of Mr. Hill, the sheriff, or any of these other parties whom you have mentioned, saying about Mrs. Eaton or her children making any claim to that land? Whether you relied on it or not is another question.

A. Well, I don't think I knew of a claim of ownership to that land by Mrs. Eaton through these parties. I knew these parties were trying to buy that land about the time they talked of machine shops there; they was looking up all lands in that neighborhood, and it was a general looking up of lands.

Q. And that was prior to the signing of the contract, wasn't it?

A. The time they were looking around about machine shops and purchasing land there was prior to it, and the time that that property was being offered for sale was prior to it. That was along in the winter.

131 Q. And during this time you knew of these parties making remarks in regard to Mrs. Eaton or her children making some claim to title there, didn't you?

A. I don't think that I ever heard any remarks from any of those parties, they rather stood aloof from me.

Q. Did you know of their making remarks? That is the question.

A. Well, I think not.

Q. Did you hear anybody else say that these parties were making remarks in regard to the title?

A. My impression is that I did at some time, but just the time that these remarks were made, or the time that I heard it, I can't just place.

Q. Do you know now that during all this time Mr. Newbegin knew that Mrs. Eaton and her children were making some claim to title there, don't you?

A. I did not know that.

Q. You know now, I say, that during that time Mr. Newbegin knew that Mrs. Eaton and her children were making a claim to the property?

A. Well, I will repeat the testimony that I know what he has stated in his testimony; that is all I know.

Q. I want to know when you had your first conversation with Mr. Newbegin in regard to the title of this property, if you can recollect it?

A. The first word, I think, I ever spoke to Mr. Newbegin was when I saw him passing, as I stated in my examination-in-chief.

Q. I mean in regard to the title of this property.

A. I think that Mr. Newbegin assured me that the title to that property was good in Mr. Eaton, at once.

Q. And when was that?

132 A. About the time that I passed my title over to him—half of the contract—interest in it.

Q. What did he assure you at the time that the contract was signed in July, 1874?

A. My impression is, that I made that contract independent and outside of Mr. Newbegin, and it was some time after, although the date was the same—run back, so as to run equal with interest, etc.

Q. Then up to the time that contract was signed you had no conversation with Mr. Newbegin, in regard to the title to that property?

A. Well, my opinion is that Mr. Newbegin's idea was, if that property sold there the title would be good, and that a contract with Mr. Eaton was good.

Q. I don't care what his idea was.

A. He expressed himself that way.

Q. I want to know whether, at the time that contract was made, you had any conversation with Mr. Newbegin?

A. Well, I am telling you the conversation.

Q. Is that all of it?

A. Why, I may have talked half an hour about things that were not pertinent to——

Q. Was anything said in that conversation in regard to anybody else except Mr. Eaton making a claim to the property—the conversation you refer to that occurred about the time of the signing of the contract?

A. I have no recollection of any indication by Mr. Newbegin of Mrs. Eaton's having a claim there.

Q. Was anything said in regard to her making any claim to the title?

A. There might have been something said in the course of

133 that summer or fall.

Q. Was there anything said in any conversation that you had with Mr. Newbegin at or about the time of the signing of this contract?

A. I don't think there was.

Q. Will you swear that there was not?

A. I think that I signed that contract outside of Mr. Newbegin, and made the bargain; run the whole trade outside of him; showed it to him afterwards.

Q. At the time that the contract was signed?

A. Well, he was not present when it was signed.

Q. I don't care in regard to that. I say at the time the contract was signed you knew that Mr. Newbegin had some expectation of making a part purchase of that property with you, didn't you?

A. At the time I signed it?

Q. Yes, sir; with Mr. Eaton.

A. I don't know whether it was at the time or after; I think it was after.

Q. It was not very long afterwards, was it?

A. Not a great while; I told Mr. Newbegin if he wanted to go in partnership into that he could take a half interest some time.

Q. But nothing of that sort was contemplated at the time you signed that contract with Mr. Eaton, in July, 1874?

A. Well, nothing agreed upon; I considered myself holden.

Q. Was there anything said about it between yourself, Mr. Newbegin, and Mr. Eaton, or any one of you?

A. It might be that I might have mentioned it—about letting him take an interest in that loan—somewheres about that time.

134 Q. When did you first learn of Mr. Allen's will?

A. Well, we sent on and got that—I think Mr. Newbegin did, and showed it to me.

Q. When was it?

A. Probably a year after that contract was made; maybe it was two years.

Q. I want to know whether, at the time this contract was signed, you knew anything of William Allen's will?

A. No; I knew nothing about it at the time that contract was signed.

Q. Was anything said about it by Mr. Eaton?

A. I have no recollection of anything being said.

HENRY NEWBEGIN, being recalled, testified as follows:

The fact that there was talk of purchase of this land by Wilhelm, and others has been referred to by Mr. Holgate. I had a conversation with Mr. Eaton in regard to that matter when he first came out to Defiance, after I had borrowed of Mr. Holgate, on his account, the money that I referred to in my first testimony and paid off these costs on the order of sale.

By Mr. HOYT:

Q. That is, you had a conversation in regard to the claims of Mrs. Eaton?

A. No, sir; in regard to the purchase of this land by Wilhelm, Karst, Hill, and Rowe, almost the first words he said to me when he came into my office—an allusion was made to this execution or order of sale, perhaps, being out for these costs; I think it was an execution for the costs and levy on the land; that is what I should

135 say, but it may have been an order of sale—was that he owed them no costs; that it was a contrived plan on the part of the sheriff and Adam Wilhelm and Hill, who had been his attorney in the case, to swindle him out of the land; he used the word "swindle." I am using now his word. He told me that Adam Wilhelm had been on to Fryeburg, where he resided, and had tried to purchase that land of him for from twelve to fifteen hundred dollars at the outside, telling him that the land was comparatively worthless, and that he and Karst wanted it and parties I do not now recollect, although he told me—Karst was the sheriff—that he and Karst

wanted the land and could afford to give him more for it than anybody else. Said I to Mr. Eaton: "Did Mr. Wilhelm disclose to you the fact that a railroad was about to be constructed through there?" and he told me, No, not a word had been said to him. Said I: "Did Mr. Hill, in any of his letters to you, indicate to you that a railroad was to be located through there?" And I will say here now that Mr. Hill was the attorney for the railroad at that time, and so remained down to January 8th, 1878, when I took the place. Mr. Eaton replied to me that he had not, and that his first intimation or information that there was to be a railroad constructed anywhere near those premises was from a letter that I had written him; and he said that Mr. Wilhelm repeatedly and urgently persisted that the land should be sold to him for the sum that he claimed, for the reason that it would probably be the last opportunity he would have to sell it at any price; that there were no lands being sold in that
136 vicinity; that it was comparatively worthless and that unless he accepted his offer he would rue it; and then he told me that that among other things was what gave rise to his wanting to change his attorney from Hill to me. I have heretofore testified that he had written me from Cincinnati; I told him the lands were worth more than fifteen hundred dollars at that time, and that I thought that they were worth about four thousand dollars, and if he could get that for them from Hill, or Wilhelm, or anybody, he had better sell them. He then told me further that as a means to induce him to sell the land to Wilhelm, told him that he had a straight tax title against them, and that that was the first time he had learned that Wilhelm had any claim for taxes, or otherwise, upon the lands; and that unless he sold the lands to him, he should still claim them under his tax title, and that he thought he had good title; that Hill told him that he had good title to the land under his tax lien; and that if Eaton would not sell to him and take what he could get he would hold them under his tax lien. I am speaking now the language that Eaton told me Wilhelm told him Hill said as a lawyer, that he would hold him under his tax lien, and he might be damned. That is a very common expression of Hill's. And he said further that it was in pursuit of his resistance, rather, to let the lands go to Wilhelm that this execution for costs had been issued, at the sheriff's own instance, to the sheriff to sell his lands; that he was not holden for them; he said the costs had been paid; whether they had been paid or not I don't know. There was no record that they had been paid; I looked up that myself.
137 He said that the costs had been paid in full, and that it was a contrived plan, including the tax lien, Wilhelm's coming on there, and the issue, and the execution, the letters from Hill, because he showed me letters from Hill and I produced them, that he had better sell to Wilhelm. Wilhelm took on a letter of introduction from Hill, his own attorney—a contrived plan to swindle him out of the land for a song; that is all I have to say on that subject. The location of the shops at Garrett was not made public or known to anybody till some six months after this contract was made, or two months at least; this was in the fall; the contract was made

in July. Well, it was not till the fall, September along till new year's, that the location of the shops at Garrett—now, I can't say it was till later than that; I know it wasn't till fall. The road, as I stated in chief, was constructed to Defiance in June, 1874, and opened for traffic in August, 1874, to Defiance, and the location to my certain knowledge, that is, any work, or anything done at Garrett. Garrett was right out in the woods; the company themselves bought up the lands, or the directors of the company and their general attorney, Mr. Cowan, bought up the lands and located the shops there to locate a town themselves to make a profit. There was nothing done, to my certain knowledge, towards the construction of any town, or construction of any shops there till a year after that at Garrett. But I afterwards learned that the fact that the company had refused to give us the shops at Defiance and had actually located them at Garrett. I afterwards learned through Mr. Keiser, the vice-president and managing director, and under whose entire charge the construction of that line was—he was the king of the
138 whole thing—was either before or very soon after he had the conversation with Mr. Holgate, that Mr. Holgate alludes to, but it was not disclosed to the public and no one knew of it till long after, or till a while after that.

By Mr. Hoyt:

Q. And you did not know of it?

A. Why, I should not have gone into that land, as I testified, if I had known of it. Mr. Holgate has refreshed my recollection as to that contract. I had nothing to do with the terms of that contract; knew nothing at all about it. I see that I witnessed it. I am an attesting witness. One day in Mr. Holgate's office. The contract is written on letter-heads of my own. I don't know how it came to be written on those letter-heads, except that Mr. Eaton was in the habit of using my letter-heads in my office from the time he first came out there, and he took some of them. I know he asked me to his hotel. How the contract came to be written on them I know nothing at all about, but I recollect that in Holgate's office one day, after we had had the talk that if these lands were purchased I might take a part interest subsequently if I chose, which I testified to in chief, Mr. Eaton and Mr. Holgate produced that contract, and requested me to witness it, as I did, at the request of Mr. Eaton. How long that was after it was written I don't know whether it was a day, or a week, or a fortnight, because Mr. Eaton remained around there that summer some length of time—quite a while. I should say, however, that he left for home soon after he raised the money and the contract was executed, probably within a week after that. This lower clause in regard to my having a right was not on at the
139 time I attested it. When that was put on I don't know. Indeed, I did not know that that was on when it was produced here the other day. I think that was put on by Mr. Holgate without my having any knowledge at all about it. I don't think I ever knew that was on that contract until I saw it here the other day. I have no knowledge when that was put on. Of course I must have

known it was put on, because at the time that the suit was brought against us I was examining the description in the contract, and I must have known it then, although I have no recollection at all about it. I had entirely forgotten it was on there, but I know I have seen the contract once or twice. The quit-claim was not dated until September 15th, 1875, from Holgate to me.

(Quit-claim deed from Wm. C. Holgate to Henry Newbegin introduced in evidence, marked "Exhibit 44.")—Found on page 209.

I had a conversation with Mr. Holgate, and I am strongly inclined to think after the contract was written and Eaton had gone away, but I may be mistaken as to the time. Anyhow, it was after the agreement had been entered into between him and Eaton—whether reduced to writing or not I won't say—in which I told him that it was none of his business what I knew about other claims if I purchased the land there; that I thought if I was to have any interest in that land I would rather take it from Eaton's deed alone, and I used the expression that I "didn't care a damn about any other claims, that Eaton's deed there was good enough for me as a lawyer to pass title to that land—absolute title—and that I would have taken the risk. I never disclosed to Mr. Holgate from that time till, certainly, I testified here before that I had any knowledge
140 that Mrs. Eaton had any claims there independent of what a wife usually would have in the lands of a husband.

Cross-examination by Mr. HOYT:

Q. At the time this contract was signed you did, as a matter of fact, know that claims had been made by Mrs. Eaton or her children to the property, didn't you?

A. No; I testified that I did not before.

Q. You knew that certain parties had said that she made some claims there, didn't you?

A. I had heard, I think, from Eaton himself—I used some *used some* language as to claims before—the fact is, I had heard from Eaton himself the manner in which he became invested with title to that land—from J. B. Eaton—I never heard of it from any other source.

Q. Prior to the date of this contract?

A. O, yes; I say I was acting as his attorney prior to that time. Indeed, I heard from Eaton himself in regard to that in the very conversation that I have related here, that Wilhelm and Hill and Karst were trying to swindle him out of the land; and he went on further, I am obliged to you for the suggestion; he went on further and told me that after certain claims were paid out for advancements, in that very conversation now; that is where I first heard of it, as I say, I am obliged to you for the suggestion. He said that his wife owed him for money advanced on that very thing, and that after certain claims had been paid out of it he should be under obligations to return her the remainder. He claimed that these
141 costs ought not to be paid, because they would come out of his wife in the end; that they were duplicate costs; that the

land ought to bring the most it possibly could, because his wife would realize in the end. And, on the other hand, he claimed that he had made large advancements; that the costs for the sale, if any was effected, his time and expenses out there and back, the taxes, Adam Wilhelm's tax lien, etc., should come, of course, out of the purchase money.

Q. You knew, then, from Mr. Eaton, before the date of this contract, that certain of the proceeds, after paying these advances, were to go to Mrs. Eaton, did you?

A. Why, I tell you I learned then that he was acting in fact as her trustee; indeed, he told me right then and there that he came out to sell that land for her.

Q. When did you first hear of the William Allen will?

A. I don't know.

Q. Was it prior to the date of this contract?

A. I think I first heard of the William Allen will from Eaton at that very time; that is, about that time; after he had come out to Defiance there.

Q. You have a copy of that will, have you not?

A. Yes, sir; but that is our business; you could have had a copy if you had wanted it.

Q. We have a copy. Have you any objection to our putting it in evidence?

A. No; we are going to put it in ourselves before we close. Well, immediately after learning the fact that this will had been executed, that there was such a will in existence—and I must have learned it from Eaton, I have no recollection about it, but I must
142 have learned it from Eaton—I know that I went scurrying about to try to find out where the will was probated, and it took me considerable correspondence to find out. I thought it was in Warren county—it seems that the will was made and first probated there. I thought there was where I could get hold of it, and I wrote around to two or three counties before I got a copy. Finally I got it from Cincinnati, from Hamilton county, and it must have all been effected before November, because I see that the attesting certificate of Judge Mason, of Cincinnati, to that transcript is dated on the 5th day of September, 1874.

Q. Have you refreshed your recollection as to the date when the decision was made by the probate court in favor of Mr. Eaton?

A. No. I intended to, but I have been so busy—been out of town most of the time—that I have not had time.

Q. What is your best recollection now?

A. I have no further recollection than what I referred to there, and I could not give any recollection now without referring back to my first testimony. I have no other recollection than is there stated.

Recess until 2 p. m.

Since dinner, I have been furnished with a deed, written out, but not executed, which I recognize as being in my handwriting, and as being the deed which was forwarded with the notes and mortgage

sued on, to be executed by Mrs. Eaton and her husband, and returned to us upon the delivery of the notes. I never wrote but one deed of the sort. Some is marked Exhibit 45.—Found on page 211.

143 The plaintiff offers in evidence the mortgage and notes set up in the bill, marked "Exhibit 46."—Found on page 214.

Also, letter from Mr. Henry Newbegin to J. B. Eaton, dated April 3rd, 1873, marked "Exhibit 47."—Found on page 150.

Also, letter from Mr. Henry Newbegin to J. B. Eaton, dated May 20th, 1874, marked "Exhibit 48."—Found on page 177.

Also, letter from Mr. Henry Newbegin to J. B. Eaton, January 3rd, 1875, marked "Exhibit 49."—Found on page 158.

Also, letter of Henry Newbegin to R. I. Eaton, dated April 24th, 1876.—Found on page 176.

Also, postal card from Mr. Holgate to Mr. J. B. Eaton, dated July 23rd, '77, marked "Exhibit 51."—Found on page 201.

Also, letter from Henry Newbegin to J. B. Eaton, dated March 2nd, '74, marked "Exhibit 52."—Found on page 152.

R. I. Eaton.

R. I. Eaton, a witness called on behalf of the plaintiff, being first duly sworn, was examined-in-chief by Mr. Hoyt, and testified as follows:

Q. You may state how old you are and what your full name is.
A. My name is Rufus I. Eaton; residence, Cleveland; age, 28.
Q. State whether you are the plaintiff in this case.
A. I am.
Q. And whether you are one of the sons of J. B. Eaton and Elizabeth R. Eaton?
A. Yes, sir.
Q. Name the other issue of that marriage?
A. In the order of their ages? John B. Eaton, Lindsey L., myself, Charles L., and Horace A.
Q. Now you may state whether your father is living or not?
144 A. He is not; he died the 23rd of last October.
Q. You may state whether or not he died intestate.
A. He did die intestate.
Q. Now you may state just when Mrs. Eaton died.
A. October 10th, 1878.
Q. You may state what heirs, if any, she left?
A. The same that I have just named.
Q. State what heirs, if any, your father left?
A. The same.
Q. You boys are the only heirs of either, are you?
A. Yes, sir; that is all.
Q. Now you may state to the master, if you know, how your father and mother came to have any interest in this land down in Defiance.

A. The way my father got an interest there was through direction to Hill in a foreclosure suit.

Q. I do not care about that; go back of the suit and state how it was.

A. William A. Allen was my mother's brother; at his death he willed to my mother a certain portion of his estate.

Q. You need not state what the will contains.

A. Through the direction of my father, Bartley Campbell, of Cincinnati, acted as agent in the disposition in effecting a sale, and so on, of this property, and the proceeds were turned over to him.

Q. To whom?

A. To Bartley Campbell.

Q. Bartley Campbell retained the proceeds?

A. He did absolutely; my mother's portion so derived was used by Bartley Campbell for his own benefit; then my father saw him, and told him that he wanted him to pay that money.

145 Mr. KINGSBURY: I suppose that is hearsay.
Mr. WILLEY: What did Campbell do?

A. Campbell owned—had a mortgage on this Defiance property, and this mortgage he assigned to my father.

Q. Where is that mortgage?

A. I have it.

Q. This instrument you have just handed me is the mortgage?—Found on page 220.

A. Yes, sir.

Q. Those are the notes, are they?

A. These are the notes.

Q. Now go on and state what you know about the foreclosure proceedings.

A. This was given and assigned to my father in payment of the $2,400 that Campbell had used that belonged to my mother, and upon this foreclosure the property was bid in in my father's name by his direction—bid in by lawyer Hill, of Defiance, as his.

Q. How do you know this?

A. I know this through letters that my mother has left, and know it also from conversations I had with her.

Q. I suppose the record down there would be best evidence of that; at any rate you know the land was bid in?

A. I know the land was bid in.

Q. In that foreclosure by your father?

A. Well, my father assumed control of it, but it remained there unimproved; I don't know that there was anything done about it until this condemnation matter came up in 1874; the Baltimore, Pittsburg, Ohio and Chicago Railroad condemned a small piece, thirteen acres, for railway purposes; the remainder of the tract, some eighty acres or more, father contracted with Holgate
146 and Mr. Newbegin for a certain sum, and entered into an agreement there between them to convey that property.

Q. You may state how long that mortgage and the notes have been in your possession?

A. I had them since the fall of '72 or winter of '73; I think they were sent to me in the winter of '73; after my brother went to Indianapolis, I think they were sent to me; still I am not positive as to that; at any rate it was either at the very close of '72, or in '73.

Q. Mr. NEWBEGIN: Did you state who sent them to you?

A. Sent to me by my brother, John D.; I was in Cincinnati at that time; my brother sent them from Indianapolis. (Tender made by the witness to the defendants of the notes and mortgage referred to in his testimony.)

Cross-examination by Mr. NEWBEGIN:

Q. When, if ever, did you make known to your father the fact that these notes and mortgage were in your possession?

A. I never did.

Q. Did he have copies of them?

A. I can't say; I don't know that he had, but it seems——

Q. You need not tell what seems; when, if ever, did you make known to him that your brother had possession of them?

A. I never did.

Q. You think it was in '73 you got possession of them?

A. Close of '72 or early part of '73, I am not positive about that.

Q. This brother at Indianapolis was older than you?

A. Yes, sir.

Q. Do you know how long they had been in his possession?

A. I do not.

147 Q. Have you had them in your possession from that time, the time you received them from your brother, as you state, down to the present—had control of them—I will put it in that form?

A. Yes, sir; I think I have; I have had control of them from that time down.

Plaintiff offers section of the will of William A. Allen in evidence, marked "Exhibit 54."—Found on page 227.

Q. You got the mortgage and notes you say, in '73?

A. '72 or '73.

Q. Now, from that time until your father's death, state whether you ever saw them.

A. I never did.

Q. State where you have been living.

A. I have lived in the city most of the time since then.

Q. Where has he been living?

A. He has lived in Fryeburg, Maine, some of the time.

Q. Mr. HOYT: He formerly lived in Cincinnati?

A. Yes, sir.

Q. What time did he leave Cincinnati for Fryeburg?

A. In '66, as I remember.

Q. Mr. NEWBEGIN: Did he not return and reside in Cincinnati?

A. Not after '76; he made a few visits there, but never had a residence there.

HENRY NEWBEGIN, recalled by defendants, testified as follows:

I stated in my examination-in-chief that Mr. Eaton had employed—had written me several letters in regard to Hill and Myers prior to his employment of me as his attorney
148 or agent there, and that I had finally told him, while I would answer him fully in regard to everything: that I had finally told him that I could not act as his attorney until he discharged those; that appears in my previous examination. Now, this letter of April 3rd, '73, is one that I wrote him advising him that that road—it was while Hill and Myers were acting as his attorneys—advising him that the road was being constructed there, and in regard to the value of this land, and in regard to which I stated here a little while ago; he said Hill had never let him know that that railroad was being constructed at all, and the first information of it he got from me, that I advised him of it. This letter was in response to some of his as to condition of his land, while it was in his own attorneys' hands there, Hill and Myers, and advising him of the fact Hill was trying to buy it then, and Wilhelm. That is, in regard to the first letter, all I care to say about it. The letter of March 2nd, '74, is the next in the order of time, although not next in the order in which you put them in. This is the one in which you claim from it; we were seeking to get the title in his name. (Reads letter.) Now, it had been given out—came to me from some source, I think from Eaton himself—that Hill claimed to have contracted his lands by written contract as the agent of J. B. Eaton to Kasto & Wilhelm, Kasto the sheriff, and that Wilhelm was on there insisting on his right to buy under Hill's contract as his agent; and this about the land "in your name" was referring to the getting up of that contract that Hill claimed he had and insisted on, and Wilhelm
149 was insisting on his rights under that contract as well as under the tax lien; the $200 referred to here, for which he sent me a draft, Hill claimed he had old fees in it, as attorney; Hill and Myers, as attorneys for J. B. Eaton generally, not in that case, or but very little; he claimed there were fees due him; and that they must be paid; I had written Eaton to that effect, and he sent me this $200. Now, out of that $200 I was to pay Hill whatever belonged to him, and I paid him a hundred dollars and kept the rest myself; it was appropriated, applied as a retainer, and afterwards Mr. Eaton was credited with it for business I did; I stated that is the only money I ever did receive from J. B. Eaton as his attorney, $100, there and there was some kept out of the proceeds of that appropriation money; I think likely there was some there; so that of this $200 half of it went to pay Hill on what he claimed to be old fees, and half of it was for my fee.

Q. (Mr. KINGSBURY:) Getting the title in your name?

A. Getting title there referred to the contract that Hill claimed that he had made to Karst & Wilhelm, as agents—the expression is faulty; it was long before I ever thought of selling the land or I had anything to do with it; before I knew there was such a person in existence as Mrs. Eaton, so far as I now know. This letter of

May 20th, '74, refers in part to the thirteen-acre tract of land that the railroad company was going to condemn, in which I was then acting for Eaton; I had, prior to my taking this retainer, acted for him as his attorney; he wanted me to see if I could sell the land; I told him I would not do it until he got rid of Hill; and this refers to that one piece, for which I state there [was] an offer of
150 $1,700, and advise Eaton to take it by all means. In my testimony-in-chief I stated here it was worth $1,500, and the other part of it refers—I suppose that I had a talk with Mr. Holgate to see if I could induce him to buy that; and at the time this letter was written there was nothing further from my thoughts than that I was going to enter into that land purchase, except as stated in that letter, that I would take a third interest if Mr. Holgate wished me to.

EXHIBIT 47.

DEFIANCE, O., *April 3rd*, 1873.

J. B. EATON, Esq.

DEAR SIR: Since writing you last, I am informed that the R. R. of which I spoke has been *finally* located on S. of town, and close to a part of your land. That the Co. yesterday contracted for 18 *acres* for depot and other purposes, transfer grounds, &c., in the immediate vicinity, and at any rate not far distant from one corner of yours; indeed, I am not sure that it does not embrace a part of it from Wilhelm. The company pay $100 per acre, but land in the vicinity will be worth much more than that. Under these circumstances, your land in a short time probably will bring at rate of $100 per acre for *the whole tract*.

Now I write this simply to give above information and to make suggestion. I am quite certain *a claim* will be made that this land has been sold, and attempt to hold you to bargain. What authority you have placed in ag't's hands to sell, or whether any sale
151 could be made or not by any one except yourself, you know best, and I know nothing. But if you think there is an attempt to sell you out, so that if a contract is out you could be held by it, would it not be well for you to actually *sell and convey* the land for some decent price, not less than $5,000, and let deed go on record? The purchaser could *then hold it* against all *the world*, and the only remedy any one could have under the pretended contract would be against you for damages, and I am satisfied, if you were careful to give them no notice of what you intended to do, they would place the date of the contract so far back, before the *rise* in value of land, that only a small sum, if anything, could be recovered of you. If you are willing to trust me to send a deed with grantee's name in blank, executed under Ohio laws, I will undertake a sale, in which case no notice should be given to other parties that I had anything to do with it. Only it would be best at once to write Hill, withdrawing all authority whatever from him, but in such way as not to admit he had heretofore had any authority to sell, and under no circumstance intimate that any one else was acting in the matter, till

your sale was actually affected and deed recorded. I think I could in that way get $5,000 cash for your property, perhaps more (perhaps it ought to bring twice as much), and if you *got proceeds of sale*, no one could have process against you here, but must go there to sue you, which never would be done. Or, if you think it best not to do as above, if you do not object to a western trip, perhaps if you saw your land yourself you would determine better what to do.

Yours truly, HENRY NEWBEGIN.

152 "EXHIBIT NO. 52."

DEFIANCE, O., *March 2nd*, 1874.

J. B. EATON, Esq., *Fryeburg, M.*

DEAR SIR: Yours of the 24th Feb. received, inclosing draft for $200, as stated. I have to pay Hill $100. Will write you again in a few days, inclosing his receipt—just as soon as I can get deed of sh'ff delivered and on record, so as to *have title to that land in your name*. I will withdraw my refusal to act further for you, and take agency of your land here.

Yours truly, HENRY NEWBEGIN.

Was glad your draft was on *New York*; we prefer it here to any other.

J. B. Eaton's Contract with W. C. Holgate and H. Newbegin.

DEFIANCE, O., *July 30th*, 1874.

This memorandum witnesseth, that John B. Eaton, of Fryeburg, in the State of Maine, has this day sold to William C. Holgate "that part of the east half section 27, T. 4 N., R. 4 E., lying between the Fort Wayne road and the W. & E. canal, and containing 95 acres, more or less, excepting $12\frac{75}{100}$ acres now held by Michael Gorman, and all more fully described and set forth in a deed this day executed by said Eaton to said Holgate."

153 It is understood said Holgate is to pay for said land the sum of six thousand dollars, and the tax claims now held by Adam Wilhelm, or so much of same as is a valid lien on said premises, one thousand dollars of which is to be paid on or before Oct. 1st, next, two thousand dollars in six months thereafter, fifteen hundred dollars in *in* one year, and fifteen hundred dollars in two years thereafter, with interest from and after said October first.

It is further understood said Eaton is to execute another deed of warranty, his wife being joined with him as a grantor in same, and to forward said deed on to H. Newbegin for said Holgate, which is to be substituted for the deed this day executed to said Holgate, as aforesaid.

And said Eaton agrees to send on to said Newbegin the mortgage and notes on which the judgment was taken, by which his said title was acquired, in case he can find same, to be filed as law requires.

It is further understood and agreed that if, on or before said October first, from any cause said Holgate shall prefer not to hold said

premises on the terms herein set forth, said Eaton agrees to repurchase same of him, and to release any installment that is unpaid of said Holgate's portion of same, and the obligation to pay said Wilhelm's tax claim; also to refund, with interest, four hundred dollars ($400) this day advanced on said $1,000.00 instalments to come due Oct. 1st, next. And for any advancements to said Eaton by said Holgate that is or may be made said Holgate shall have a lien on said premises, and may hold the title to same as a security till such advancements shall be adjusted. If, however, said Holgate shall be satisfied with said purchase on account of title, quantity of
154 land, and all other particulars, he shall, at any time after said 60 days, on demand of said Eaton, execute and deliver his notes for any unpaid part of said instalments secured by mortgage on the premises, it being understood that any amount the railway companies may pay over for the portion of said premises between the two railways shall be credited on said $6,000 to be paid by said Holgate, or to go to said Eaton, less advancements aforesaid, if said Holgate shall prefer to release and reconvey his interests in the premises aforesaid.

Given under our hands and seals, this day and year above written.

J. B. EATON. [SEAL.]
WM. C. HOLGATE. [SEAL.]

Attest: H. NEWBEGIN.

(In Duplicate.)

For value received, I hereby make over and assign to Henry Newbegin the undivided half of all my rights in and to the above and foregoing contract, and agree to release to him the undivided half of so much of the within premises as shall become vested in and belong to me, he paying and performing the same conditions in concert with and equally with me, as I am bound to perform same as above set forth, and taking risks with me.

Defiance, O., July 30, 1874.

WM. C. HOLGATE.

"EXHIBIT 28."

FRYEBURG, M., *Aug.* 15, 1874.

H. NEWBEGIN, Esq., *Defiance, O.*

155 MY DR SIR: Since my return from Ohio I have been crippled up a part of the time, and so unable to attend to my business; the residue so absorbed in matters needing attention that scarcely a thought had been given to matters in Defiance. Yours of 8th instant (including Holgate contract and statement) was rec'd night before last. Yesterday I made search among my papers for the Wiesenburg mortgage and notes, and, being unable to find them, *upon* inquiry was informed by a *member* of my family that at about the time my answer was prepared and forwarded to Hill and Cowen, in the foreclosure case, the mortgage and notes, which ought to have been forwarded with my answer, were taken possession of, and *without my knowledge or consent* handed over to my son, J. B. Eaton, Jr.,

who is now in Oregon. This was and is all wrong, and places me in an awkward position, tho' neither the mortgage or notes have ever been indorsed or transferred by me to any one, and of course can be of no use to any one, and of no avail, except, perhaps, to embarrass the ignorant. The decree of foreclosure rests upon the mortgage and true copies of all the notes, and if the omission to file the mortgage and notes can in any event be regarded as an irregularity *it is now too late* to be avoidable. I have supposed the mortgage and notes were in the hands of Hill and Cowen till Hill told me otherwise; then I supposed they were among my papers. Hill says I gave a reason for not sending them with my answer; if so, I have forgotten all about it, and think he is mistaken. It is true I was sick at the time, and *and* after preparing my answer left all to Hill & Cowen. I regret my inability to produce the mort-
156 gage and notes, not because their non-production can effect past proceedings; but because of my engagement to produce them, but because matters *are as they are*, tho' I have had no agency or knowledge in bringing them about. Again, it is possible that some of my family may have written a letter to some person or persons in Defiance, tho' Mrs. E. says she knows nothing of any letter of the kind. At any rate, circumstances give some *color* to the reports of the *hounds at and in* the "*Defiance ring.*" As to the condemnation case, I will write to Mr. Luther the early part of the ensuing week, instructing him what to do. *Should* the company conclude to accept my proposition, $2,500, the money (less am't due Mr. Holgate) can remain in Mr. Holgate's hands, or in bank at interest, until all questions concerning it are settled; so if Mr. Holgate purchases it, proceeds, except necessary expenses incurred, can remain in some way. I hope he will be able to determine soon, as I have an offer from a Defiance man, whose name I withhold (by request). I regard (as you know) my title as a good and valid one, the purchaser having no concern with the application of the proceeds; but, in order to make the purchaser perfectly safe and easy, the proceeds may remain as above, and if Weisenburg or Wilhelm, or anybody else, want to litigate, they can do so fo their heart's content. I despise litigation and difficulties in entails; but the *troubles* of this *life* seem to *have no end*, and if forced on me I will fight them to the last. As to the mortgage and notes, they would doubtless be returned if I should write for them; but as they were carried away without my knowledge or consent, I prefer they should be returned (if returned at all) without my request. Their absence cannot
157 effect the title of the purchaser, and the proceeds may not be distributed until they are produced, if necessary. I cannot be present at the hearing of the condemnation case, as I am obliged to attend court in Portland on first Tuesday in Sept. ensuing, and on 3rd Tuesday at Paris. Please explain to *Messrs. Holgate*, Hill & *Luther* about the mortgage and notes, as I wish to put myself as nearly right as I can. Saw some of your old acquaintances in Portland (their names not remembered at this moment). They have been well acquainted with you in former years, and spoke in complimentary terms, &c. The weather is delightful here. Crops excel-

-ent, except corn. Wilhelm plans good; will write him soon as I ascertain freights. My compliments to Mr. Holgate *et al.*, and believe me,

Yours, truly, J. B. EATON.

"EXHIBIT 41."

DEFIANCE, O., *Sept. 30th*, 1874.

Mr. JNO. B. EATON, *Fryeburg, Maine.*

D'R SIR: In reference to your sale to me of your 95 acres in sec. 27, T. 4 N., R. 4 E., this county, less $12\frac{55}{100}$ a. (known as the Grouran tract), and 5 a. (known as the Wisenburger mill property), I write to say I expect to hold same agreeably to the terms and spirit of the contract, with the understanding that since the probate court and jury have taken action and awarded $2,600.00 to you for the tract between the r'w's, before you sent deed agreed upon; that you now send on to Mr. Newbegin a warranty deed, executed by your-
158 self and wife, for the balance of said land, being all purchased, excepting said tract condemned for r'w. purposes.

This deed you may make directly to Henry Newbegin and myself, and we will arrange for payment of the balance of said $6,000.00, to wit, $3,400.00, as understood.

From the $2,600.00, I now understand to be on deposit with the probate judge, I will expect you to pay the $400 *loan.*

We understand there will be some litigation, and will expect you to remove all reasonable doubts or clouds on title, except the Wilhelm tax claim. If you have a copy of the will of Wm. A. Allen will you please send same on with the deed, and will you please inform us whether bail was given, and other conditions, if any, complied with in the execution of your trust. I will suggest whether it might not be well for some other person, if you would prefer not doing it yourself, to write J. B. Eaton, Jr., for the mortg. and notes; your wife perhaps.

We are having a very pleasant fall, but it is very dry.

Very truly, WM. C. HOLGATE.

"EXHIBIT NO. 49."

DEFIANCE, O., *Jan. 3rd*, 1875.

J. B. EATON, Esq.

DEAR SIR: Your favor of the 29th ultimo has been received. Our next term of court will be on Jan. 17th, inst. There has been
159 no change in the mill suit since you were here. I prefer to have nothing to do in that case for either party.

I hope the land matter may be soon adjusted, otherwise we shall be forced to file bill to quiet us in possession, and the cost of which, of course, will have to be paid by defendants, if they resist our title.

Yours very truly, HENRY NEWBEGIN.

"EXHIBIT 2."

DEFIANCE, OHIO, *June 7th*, 1875.

J. B. EATON, Esq., *Fryeburg, Maine.*

DEAR SIR: After consultation with Mr. Holgate we have prepared deed for yourself and wife to execute, with notes and mortgage executed by us to your wife for the $3,000 back purchase money, dated October first, 1874, all as you directed, and Mr. H. will forward these to your wife, thinking that by writing her specially she will
160 better understand the matter, and that there will be no hesitancy about the signing of deed; the notes bear interest as per agreement, from Oct. 1st, '74, and are dated on that day as well as the mortgage and deed; all are of same date for good reason that mortgage may be to you a first lien on the premises. I have sent you a deed, to wife, excepting this R. R. property condemned, for reason that the deed you took away from here for execution warrants title to the whole land, and I should not want you, nor wife, to make such warranty. Please execute it at once, have it acknowledged before some officer competent under your law to take such, but in form as I have filled out, and fill in date of acknowledgment. Also, when that is done, fill *same* date in blank, acknowledgment of the mortgage.

You will see, in consideration of deed, I make it $3,800; $400 we paid you (per year note) when here, and, as you requested, we say nothing about the interest on it since (12 per ct.), and it will cost as much over, $400, perhaps $600, as he is claiming penalties in full, if not title, to get up Wilhelm's tax deed.

The $2,600 for that condemned by R. R. is still in court, to be paid to whichever the court shall decide, you or wife; but, as I said, if your wife will instruct her att'y here, Mr. Myers, or Mr. Hill, that matter might be settled and great costs saved.

Now, we have given all this, covering $3,000, as you directed, absolutely to your wife. All she will have to do is to send the note to the bank here, and the money, when due, *will be promptly paid;* or she can send them through any bank in Maine.
161 (but I fear we are giving much more than the land is worth I want the matter settled up *at once* or my money back), and more than we can at present get for it, and more than you can get for it. The R. R. shops are not to be here, nor anything else; not even a shanty will the R. R. build there. Everything of that sort has absolutely gone by us, and I am living up to my contract only because I agreed to. I will sell out to any one my interest if they will pay me back that $200 back, *without interest.* And, in all reason, your wife can never have another such opportunity offered her to sell this land (even if it be hers absolutely); and if we are to have it, we want these claims released *at once*, so we can control it without further loss.

I hope you will be able to have this attended to at once, and send us our deed.

Yours very truly, HENRY NEWBEGIN.

"EXHIBIT 1."

DEFIANCE, O., *June 8th*, 1875.

MRS. ELIZABETH R. EATON, *Fryeburg, Maine:*

Enclosed please find a deed for property contracted to me by Jno. B. Eaton, for execution by yourself and Mr. Eaton; also, Mr. Newbegin's and my (2) notes of $1,500 each, payable in one and two years from Oct. 1st, 1874, to you, with interest, for the balance of the purchase money, together with our mortgage to secure the same to amount of $3,000, with interest as stated.

162 We make the notes payable directly to you, as Mr. Eaton informed us you have an especial interest in [the] matter, and expresses a wish we should do so.

The consideration we put in deed at $3,800. We having advanced to Mr. Eaton whilst here looking matter up $400 cash towards the purchase money of same, and there being an outstanding tax deed in hands of Adam Wilhelm, that we expect to be under the necessity of paying to perfect the title, which we estimate to amount to another $400.

This deed, understand, does not embrace all your interest in the land in Sec. 27.

The Baltimore and Ohio R. W. Co. have had the most valuable part of it condemned for R. W. purposes, and they have paid over to the probate judge of our county $2,600.00 for same, which will be paid over whenever a proper satisfactory adjustment is made by the court in reference to the same. And this will be in addition to our notes, making the full consideration of the whole property $6,000, or over.

In this connection, allow me to say that the hope that existed at the time Mr. Eaton was here of securing R. W. shops is entirely gone, the shops having been located at another place, and that the prospects now for an increase in the value of this property is not as good as it was at that time.

Please, as soon as you can conveniently do so, have the deed properly executed and mailed to me.

Very respectfully, W. C. HOLGATE.

163 EXHIBIT 29.

Confidential. FRYEBURG, *June* 22, 1875.

H. NEWBEGIN, *Defiance, Ohio.*

DR. SIR: Yours of the 15th inst. and one the week before and one several weeks ago, inclosing one from Bro. Sutphen, have all been rece'd. I have delayed answering, hoping to be able to have matters arranged so that my obligations to you and Mr. Holgate might be fully performed according to their letter and spirit, but no word has passed between myself and any member of my family touching this business since I last wrote you, and but for my obligation to H. and yourself, and my anxiety and determination to fulfil the same so far as it is in my power to do so, no word should ever pass between me and any member of my family touching this business.

You speak of forwarding *deed*, *mortgage*, *notes*, &c. I have neither *seen* or *heard* anything of either, tho' I have no reason to doubt that they have been rec'd. I do not go to the post office once in a year. My youngest boy is there two or three times a day, and has doubtless delivered the papers to his mother, tho' not one word has been intimated to me regarding them. The conduct of my family in this matter is to me surprising and extremely humiliating; they will probably see their mistake yet, and wish they had not been born. My opinion is, tho' I have no direct evidence of it, that this whole difficulty was caused, and is being kept up, by Mr. D. Hill, of Defiance. He has seemed determined to get this property from the
164 beginning, and declared, with an oath, in my presence, that "*Old Holgate*," as he called Mr. Holgate, should never have it. This was soon after I went to Defiance, and on mere suspicion thought H. wanted it. There is no other way of accounting for the singular conduct of my family in this business. They must be influenced by false representations or by the d—l. There will probably be some breaking out before a great while, and we shall then see who has caused the trouble. I have done everything in my power to have the business closed in accordance to my obligations to Mr. H. and yourself, and shall continue to do all in my power until the thing is accomplished; but it is hard controling an evil-disposed and self-willed person. Time and circumstances will, however, work a change. If the court had made an order directing the condemnation money to be paid to me, or even allowing me just compensation, the business would have been closed. I am pretty well satisfied that Mr. Hill has advised the Madam that the court would order the money to be paid to her or her attorneys, and *now* allowance whatever would be made to me, either for services or money advanced. I have never been advised with, or Luther rec'd my *answers* and *replies* of March 25th. Please let me know if they were rec'd. I will write to Luther within a few days, requesting him, as I request you, to see that my rights are fully protected in court. I think everything you have thus far done in court, or out of court, has been for the best, excepting that I would have preferred that
whoever made the charges of falsehood, cheating, and fraud
165 against me should have been called on for the proof; as it is these loose charges go into the record, there to remain through all time, neither proved or denied; but I do not see how it can be avoided. You and Mr. H., so far as I can see, fully complied with your undertaking with me, and it only remains for me to do my part, and would have complied on my part long ago had it been in my power to do so. You know the cause of the delay. I hope you will come here next month, when (if not before) I believe this business can be closed, but whether you do come or not, I will not cease my efforts till the thing is accomplished.

Yours truly, J. B. EATON.

166 "EXHIBIT 4."

DEFIANCE, O., *July 6th*, 1875.

MRS. ELIZABETH R. EATON, *Fryeburg, Maine*.

MADAM: Some weeks since I signed with Mr. Holgate notes for

$3,000.00, with mortgage to secure the same, payable to you, and with deed for you and Mr. Eaton to sign, inclosed all to you, with a letter from Mr. Holgate explaining the matter. We fully expected to receive the deed back before this time, but as yet have heard nothing from you. I cannot conceive of any reason for your reluctance to sign the deed. The $3,000.00 all is secured to you, and under your absolute control, and is all agreed by Mr. H. to pay for the land, except $400 advanced to Mr. Eaton last year when here. This has nothing to do with that part of the land taken by the R. R. It is really more than the land is worth; at any rate, more than I would give again were I free from Mr. H. in the matter.

167 You can do what you please with this $3,000.00, and whether Mr. E. has claim on it or not is not our concern now. It is a question for you to determine whether you care to avoid trouble and take yourself the money we voluntarily are willing to pay you, and more, I have said, than the land is worth, or whether you will run the risk of getting anything. I tell you this, because I always try to be plain in all my dealings with all, and whether you take this money or not, Mr. Holgate can hold the land. He has a deed conveying it from Mr. E., which, beyond all question, gives him title, in my opinion, for two reasons:

1st. It was a *personal* trust in Mr. E., and his deed conveyed good title to the land, and for the purchase-money, if you had any claim, you must look to Mr. E.

2d. Mr. Eaton had the *legal title to the land duly recorded*, and Mr. Holgate bought of him *without any knowledge of your claim*, and beyond all question on this ground, if not on the first, he can hold the land; for, understand that this land was never conveyed to Mr. E. in trust for you, but to the most of your claim, purchased with trust funds of yours in his hands, and the *legal title taken in his name*, and land afterwards sold by him to Mr. H., an innocent purchaser, without any knowledge of your rights whatever. I mistrusted your rights to it. Mr. H. knew nothing of them, and I have got a contract of him for half of the land long since Mr. Eaton deeded to him. I have written you thus fully that you may take this to some good lawyer whom you can trust, and take his advice as to your action,

168 but with this further statement to be added, that admitting you had full title to the land, you are getting its full *cash value*.

I have said nothing about your children, for while you live (I have examined the will fully) they have no interest or business in the matter, (except so far as you please to consult them,) and your disposition of the property is final as against them; at any rate I am willing to take that risk. What you do with the money we pay you I do not care.

Now I want to add a word as to the $2,600.00 in hands of probate judge here, for the land taken by the R. R. I do not care whose it is, except as Mr. Eaton's lawyer; if it must be litigated I shall serve him as best I can; but that money *is either yours or Mr. Eaton's*. (I have paid Mr. Wilhelm's tax claim of $425, and he has no further claim to it.) Your children have nothing to do with it, *in law*, I mean; and as I have already told Mr. Eaton, it is the most foolish

suit I ever knew, for whoever gets the money, every dollar of cost has got to be paid out of the money itself, including, in fact, also lawyers' fees on both sides, and already it has stood idle nearly a year without interest, with $250, or at least $200. Thus while the contest goes on, the fund is being consumed to pay the cost. Why cannot you and he agree (as I have already written him) how this money should be divided, and so write your lawyers, when, after costs are paid, it will be sent you at once, or, if you cannot agree to divide it, you can at least, all, (including your children,) agree to this: All of you sign an agreement that this suit here about the money be dismissed *at once*, the costs paid up, and money taken and
169 deposited in the hands of some trusty friend to you all there in Maine, as trustee, to be invested and paid over to you hereafter, whenever you can agree, as you can agree it shall be, or according to the terms of that will. This at least will settle the suit, and end a contest which, to say the least, ought to have been avoided.

I hope you will show this letter to Mr. Eaton, and, if necessary, see if you cannot agree upon some man there who will act for you.

Referring again to the deed, if it will be more satisfactory to you for me to go there personally, and there is a *reasonable prospect* of closing the matter up, I will go on receipt of a line from you, but I see no necessity for it, and it will cost me $75.00, with loss of time of more value to me; but I may say to you plainly, that whether you sign the deed or not, Mr. H. will hold the land under the deed he now has, and it is for you to say whether you will take the $3,000 secured to you, or the risk of getting nothing.

Very respectfully yours, HENRY NEWBEGIN.

"EXHIBIT 40."

FRYEBURG, MAINE, *July 13th*, '75.

MR. WM. C. HOLGATE, *Defiance, Ohio.*

The deed, notes, &c., accompanied by your letter, are received. To your letter I beg leave to make reply. I wish to state respecting the contract for my property in Defiance, as entered into between Mr. Newbegin, yourself, and Mr. Eaton, that it was
170 made *wholly* without my *knowledge* or *sanction*, and that it is decidedly contrary to my will and wishes in the matter. Mr. Eaton was not authorized by me to sell my property in Defiance, consequently I feel in no sense bound by the contract. Therefore, considering myself in no wise a party to the contract, I feel under no obligation to sign the deed. The facts were well known in Defiance prior to last summer that Mr. Eaton had no right to sell that property. Mr. Eaton has been the sole recipient of quite a large amount of money belonging to me, and I now feel in duty bound to myself and children to secure what is left, for Mr. Eaton has no just claim in the property whatsoever. At all events, I am not willing to sign the deed till the suit now pending is terminated.

Very respectfully, MRS. E. R. EATON.

"EXHIBIT 30."

J. B. Eaton. Rec'd Aug. 25.

FRYEBURG, *Aug. 23d*, 1875.

HENRY NEWBEGIN, Esq., *Defiance, Ohio.*

MY D'R SIR: It will doubtless appear strange to you, as it does to me—it is nevertheless true—that not one *word* or *intimation* has come to me from my family, or any member thereof, or anyone else, regarding the Defiance business, since you wrote me; nor has one *word* or *intimation* or any *information* come to me or my knowledge regarding any mortgage and notes forwarded to Mrs. Eaton by you, or anyone else for her, except what you wrote me,
171 nor have I any knowledge or information that she has ever received any papers of any kind from you save what you wrote; everything, and more in this whole business, is kept entirely secret from me, and all I know about it is derived from you and Sutpher, including, of course, the copies you have sent me. My family are either ignorant of the foolish litigation, or ashamed, or afraid to say anything to me about it. So far as they are concerned, all I have to say is, the whole business, if they understand it, is *wicked*; if they are imposed upon by parties in Defiance, it is an outrage. Whether I shall ever know the true condition of affairs is hard to tell—*doubtful*. I am *disappointed* and *grieved* because of my failure to perform in every respect my obligation to Mr. Holgate; he has performed his part, and nothing but *sheer cussedness* has prevented me from performing mine. *Surely* everything was done fairly, and honorably, and honestly. I have the satisfaction to believe that Mr. Holgate's title is good at any rate, both in law and equity. That I was the holder in good faith of the legal title I apprehend no honest court or lawyer will doubt or deny, and if I held it in trust, to me they must look for the honest performance of that trust; if I attempt to abuse it the remedy is clear. Mr. Holgate *cannot* be held responsible for the misdeeds of the trustee—if he has acted in good faith—but if he could be held in any way, what more can he do than he has done? What more can the "*cestui que trust*" get from Mr. Holgate, or anybody else, than has been and is offered her? With the condemnation money Mr. Holgate has nothing to do, and
172 claims no interest in it; he purchased the residue of the property and paid a full and fair price for it. True, the payments are on time, but they bear interest and are secured. What more can justly be asked for? What more can a court of equity give? Nothing. If the court will order the money deposited by the railway Co. to be paid over to me the whole business will, in my judgment, be soon closed, and I shall dispose of it as heretofore intimated (if you want it), less am't due me. If the court do not order it paid to me, then I want a *full* and fair compensation allowed for my services, expenses, &c.

Respectfully, J. B. EATON.

Have any amended or additional pleadings been filed? When

does court sit? I will do anything that can be honestly done to perfect Holgate's title, if it is not already good.

"EXHIBIT 31."

FRYEBURG, *Dec.* 29, 1875.

HENRY NEWBEGIN, Esq., *Defiance, Ohio.*

MY DEAR SIR: Please let me know when will be next session of your C. P. court. Is there any change in the mill suit—The Lessees of Water Works *vs.* Weisenberger *et al.*? Has any order been issued for sale of the property? Will the question of priority of liens be determined or decreed at the ensuing term of court? Are your relations to Mr. Holgate's interests in the mill suit such that you
173 cannot consistently maintain my interests? Everything between Mr. Holgate and myself is certainly amicable, the only question being, is my lien or his the better one? I am satisfied that the lessees of the water works are making an exhorbitant claim. They may be entitled to receive something, but not justly the whole am't claimed. As to the business between Holgate and myself, I am hoping (with some reason) that it will be arranged satisfactorily before long; at all events he is on the safe side.

My compliments to Messrs. Holgate and Sutpher, and believe as ever, yours, truly,

J. B. EATON.

"EXHIBIT 6."

DEFIANCE, O., *Feb.* 17*th*, 1876.

Mr. RUFUS I. EATON, *Cleveland.*

DEAR SIR: We have expected long before this time to receive the deed heretofore sent your mother for execution, conveying her alleged interest in the land we (Mr. Holgate and myself) purchased of your father. I understand you are her adviser, and hence I write you. We both claim that your mother has no interest in the land, but after her claim came to our knowledge, to avoid trouble, by arrangement with your father, we agree to pay her (or to whoever she would send our notes to for collection) the balance due on the land, $3,000, with interest from Oct., 1874, on her executing to us a new deed jointly with your father, and which, at the time I sent her our notes and mortgage, I prepared and sent also for her signatures. We are still willing to do this whenever we receive that deed back properly executed, but (speaking now for myself without consulting Mr. H.) I am not disposed to wait much longer. We are in possession of the land under perfect legal title, as we claim, since which you & your mother are setting up claim to it, & to forever dispose of
174 this claim, unless you assent to above, I shall in due time file a bill in court to quiet title. If we win the suit, of course the balance of purchase money will be paid your father, and suit will be also at your cost.

Yours, truly, HENRY NEWBEGIN.

"EXHIBIT 7."

CLEVELAND, OHIO, *March 14th*, '76.

HENRY NEWBEGIN, Esq., *Defiance, O.*

SIR: Your letter of date 17th ult. duly rec'd. I have thus long deferred writing you in answer, for the purpose of first considering your propositions. In regard to the acceptance of the same I cannot now state definitely. Will write you more at length soon and give you a final answer on the subject.

Yours resp., R. I. EATON.

"EXHIBIT 50."

DEFIANCE, O., *March 18th*, 1876.

DEAR SIR: You favor of the 14th instant is at hand. You misconstrued the import of my last letter. I made you no "proposition"; only stated to you the course I should pursue in case your mother failed to perform the necessary act for her to secure the back payments due on the land.

Yours very truly, HENRY NEWBEGIN.

R. I. EATON, Esq., *Cleveland, O.*

175 "EXHIBIT 9."

CLEVELAND O., *April* 17, 1876.

HENRY NEWBEGIN, Esq., *Defiance, Ohio.*

SIR: In my letter to you of date March 14th, if I recollect right, I stated that I would soon write you a definite answer in regard to the land matter in Defiance. I would here state that I am not now authorized to do so.

I am, however, requested to inquire of you if you are still willing to relinquish your claim to a certain interest in the land upon the payment to you of the amount, with interest, which you advanced to J. B. Eaton as purchase money for the land. If you will recollect, the foregoing is your proposition made to me when in Defiance last summer. If Mr. Holgate and yourself will relinquish all claim to the land upon the fulfillment of the above condition, an
176 immediate compliance therewith will be made. My mother does not desire to litigate the matter if a settlement can otherwise be effected, but if not she feels warranted in maintaining her just claim to the land even if [it] be necessary to await the court's decision.

In your first letter to me your addressed me as my mother's "adviser." I would here state, however, that I am not her adviser at all, only acting as she is pleased to direct. Please write me in reply at your earliest convenience.

I am yours, very respectfully,

R. I. EATON,
Of Euclid Ave.

"EXHIBIT 10."

DEFIANCE, O., *April* 24, 1876.

MR. R. I. EATON, *Cleveland.*

DEAR SIR: Yours of 17th inst. was duly received, and I handed it to Mr. Holgate for examination, which accounts for delay of answering.

I have to state in response to your offer to pay us what money we have paid out and interest, if we will release all claim to the land to your mother, that it is impossible, in the nature of things, to do that, as Mr. Holgate derived his title to the land from Mr. J. B. Eaton, your father, and I from Mr. H., so that we both held under him (your father). There is a large portion of the purchase money —indeed, nearly all, $3,000, with interest, if interest can be collected in law—still unpaid, and if we released we should be holden to your father for this money, and nothing could prevent his recovering it of us, as of course you do not mean to assume the payment
177 of that $3,000 to him, as that is the ground of this whole controversy between you and your father. When I made you the offer last summer I then held only a contract from Mr. H., and it was my interest in the contract I offered to release.

If possible I would still be very glad to get out of the transaction upon the terms I then offered, for I am quite certain we paid a large price for the land, but I cannot speak for Mr. H. further than above. When I get ready I shall sue your mother to quiet title to the premises.

Yours, truly, HENRY NEWBEGIN.

"EXHIBIT 48."

DEFIANCE, O., *May 20th*, 1874.

J. B. EATON, Esq., *Fryeburg, Me.*

DEAR SIR: Your favor of the 15th was received a day or two since. I am glad to hear you are better, and trust as summer comes on you may be entirely recovered. I assure you I have never construed anything you have written as distrusting my opinions, nor do I now. Those who know me as an att'y for 12 years past here, whatever else they think or say, will not, I think, say I do not serve to the best of my knowledge those who intrust their business to me. I did not write you further in regard to the small tract of land wanted by the R. R. Co., for the reason that they refused to give the $2,000 you asked, and twice since their chief engineer has been here, and both times he said the Co. would condemn it and pay the award of a jury before they would pay the price asked. Of course there was nothing for me to say to you after that. I meant certainly to write you, and thought I did, that $1,500 was
178 as much as the price of land was worth in my opinion, I do think so, and that it will not sell for more for some time to come, if ever, unless the necessities of the R. R. Co. should force them to take it. Now, as to your whole tract. After the receipt of your letter I called on Mr. Holgate, and yesterday he and I went out

to take a view of your lands and estimate their value. He concluded that, to take the whole tract, $50 per acre was as much as they were worth, and I should think it as much as they will bring for some time to come. He is buying lands for permanent investment, and if he buys yours will hold them for the future, except the 13-acre tract, which I presume he will let the R. R. Co. have, as he is a director in it. He will write you in a day or two making you the offer of that sum, $50 per acre, and take the whole tract, at ½ down, ½ in a year, or perhaps all cash, if you desire it. If you choose to accept his offer, I may on my own account take a third interest in the purchase, in which case I shall charge you no commission on the sale. I think this is as good an offer as you will be likely to have for the present, or some time to come, and I certainly think it all you will receive unless you desire to hold your lands for a permanent investment, *which will not pay a non-resident.* I have $1,000.00 I can turn in, and Mr. H. will assist me to the balance, if you require cash. The large price which I thought you might realize out of your land was upon the contingency that the R. R. Co. would locate their shops here; this it has not done, *and is not likely to do.* I think your deed from sheriff calls for about 82¼ acres of land.

Yours truly, HENRY NEWBEGIN.

179 If you do not accept Mr. H.'s offer you best tell him what your *very best* price will be; but he is, I think, making his best offer. H. N.

"EXHIBIT 5."

FRYEBURG, MAINE, *May 22nd*, 1876.

HENRY NEWBEGIN, Esq., *Defiance, Ohio.*

Through a letter from my son Rufus, of the city of Cleveland, I am informed that the proposition which I made you through him last month in regard to the land matter at Defiance, in which you claim interest, was not accepted, you claiming in the nature of things it could not be entertained. I made *that* proposition in *particular*, because I thought there would be no question but that you would accept it, inasmuch as it was the same proposition that you made to my son when in Defiance last summer, at which time you seemed quite willing to release your claim to the property upon the fulfilment of its terms, but it seems that the nature of the case has changed since that; however, let that be as it may, I wish to state, that while I do not consider my cause a hopeless one by any means (for I am advised to the contrary), yet I do not desire to litigate the matter if a settlement can otherwise be effected; and, in view of this, I offer further conditions on which a settlement can be had upon their fulfilment by Mr. Holgate and yourself. If not, however, it does not seem probable that the matter can be compromised.

180 I will execute Mr. H. and yourself a deed to the property upon the following conditions, which, I beg to add, are but just and reasonable:

1st. You are to pay me the principal, with interest on the full amount from the date the notes were given by Mr. Holgate and yourself till the date of payment; also, the payment to me of two hundred dollars for money paid out as lawyer's fees, and to go towards defraying my, or my representative's, expenses in going to Defiance to receive the money and return from thence. You claimed last summer that it would cost you at least $75 to come to Fryeburg, which you wrote you would do if a settlement could be the more likely effected. Therefore, I consider but just that you and Mr. H. should now pay my, or my agent's, expenses, in part, in going to and returning from Defiance for the purpose above mentioned. The foregoing I respectfully submit for your and Mr. H.'s consideration.

Here I rest the matter for the present, or until I receive your answer to this.

Very respectfully, MRS. ELIZABETH R. EATON,

"EXHIBIT 12."

DEFIANCE, OHIO, *June 3rd*, 1876.

MADAM: Yours of 22nd ult. was duly received. I have turned the same over to Mr. Holgate, who will answer you as soon as he comes to a decision in the matter.

Very respectfully, HENRY NEWBEGIN.

181 "EXHIBIT 12."

DEFIANCE, OHIO, *June 13th*, 1876.

MRS. ELIZABETH H. EATON, *Fryeburg, Maine:*

Mr. Newbegin being in haste, leaving for country, handed me your letter to him of May 22nd, 1876, in reference to your son's, from Cleveland, dated April 17th, with request I would answer same.

I would infer it to be your wish to have title to land sold us by Mr. Eaton returned to you on payment to us of amounts paid out by us in purchase of and the securing good title to same, with proper interest.

If Mr. J. B. Eaton will join us in this recision of contract, and we can have returned to us the money so expended by us, with, say, our bank rates of interest, within 30 days, I think we will close the matter in that way.

I cannot now tell the exact amounts paid out by us, but will have it looked up, if you wish. Some $400 was paid to release old tax titles in hands Wilhelm.

Very truly, WM. C. HOLGATE.

182 "EXHIBIT 13."

DEFIANCE, OHIO, *July 12th*, 1876.

MR. RUFUS I. EATON, *Cleveland.*

DEAR SIR: Some weeks since I received a letter from your mother offering to sign the deed for land Mr. Holgate and myself now own

here, on our giving her, in addition to the purchase price of the land, some $200, and pay, as she says, her attorney's fees. What she means by this last I do not know; but we shall pay nothing more than we purchased the land for. I handed the letter over to Mr. H. to answer, and he has done so in substance, that if your father *will release us from any claim* on his part to the balance of the purchase money, we would accept the offer made to me heretofore through you, and quit claim to your mother our interest in the land on payment back to us of what we actually paid out, being $400 to $500 to clear up tax liens, &c., and $400 to your father.

We have heard nothing from her in response.

Yours truly, HENRY NEWBEGIN.

183 "EXHIBIT 14."

CLEVELAND, O., *July 20th*, 1876.

SIR: Your letter of the 12th inst., was sent to me a few days ago from my former boarding place where it had been carried
184 through mistake, in consequence of its not having been addressed to my present place of residence. In regard to the propositions, as I understand them, which my mother made to you several weeks ago in a letter, with a view of effecting a settlement of the land matter at Defiance without litigation, if possible, I have only to say that I consider them very just, and moreover they are practically about the conditions on which you voluntarily offered to settle up this matter more than a year ago, if I recollect aright. For if you will remember, you offered to go East for that purpose, if my mother so desired, claiming at the same time that your expenses would am't to $75 to $100 in consequence. But you do not now seem willing to allow my mother anything to defray her, or her agent's, expenses to and from Defiance. And as to the matter of interest on the full amount of the two notes, I do not think there can be any question as to the equity of her claim on that point.

I rec'd a letter from her a few days ago, in which she mentioned the receipt of Mr. H.'s letter, and said she intended soon to answer it, when she probably will give you a definite —— on the subject.

Yours respectfully, R. I. EATON,
310 *Euclid Ave.*

HENRY NEWBEGIN, *Defiance, O.*

185 "EXHIBIT 15."

CLEVELAND, OHIO, *Aug* 25, 1876.

Mr. WM. C. HOLGATE.

SIR: Thro' a letter from my mother, just received, I am informed that she wrote you and Mr. Newbegin some time ago each a letter in regard to her land matter in dispute at Defiance, stating therein on what conditions she would sign the deed to the land for you and Mr. N., but that she had never rec'd any reply from either the one or the other of the two letters above mentioned, and she had therefore come to the conclusion that you and Mr. N. prefer to litigate rather

than to compromise the matter, and she has authorized me to employ counsel at Toledo and have suit commenced.

I tho't, however, I would first write you on the subject before going to Toledo, to see what could be done in the matter, if anything, without litigating it; and, in view of this fact, I would ask that you state by letter just on what conditions or terms you and Mr. N. are willing to settle this matter.

If the terms of settlement which you and Mr. N. may propose are such that I can favorably consider them, I will try and prevail on my mother to accept the same, rather than to litigate it further. If I cannot, however, so consider them, I shall feel it my duty to execute my mother's wish. I shall hope to receive a definite and early reply to this, inasmuch as I expect to leave here in a week from to-
morrow, and anything addressed to me after that time would
186 be too late to affect any good. You will oblige me by handing this to Mr. Newbegin.

Yours, very resp., R. I. EATON,
310, *New No., Euclid Ave.*

To WM. C. HOLGATE, Esq., *Defiance, Ohio.*

"EXHIBIT 16."

PHILADELPHIA, *Sept.* 7, 1876.

WM. C. HOLGATE, Esq., *Defiance, O.*

SIR: For diverse personal and private reasons I have prevailed on my mother to sign the deed for you and Mr. N. to her land in Defiance, which I presume she will have done before this reaches you. I shall be in Defiance in about three weeks to settle up this matter.

Yours, &c., R. I. EATON.

"EXHIBIT 17."

HAMILTON, MADISON CO., N. Y., *Sept.* 25, 1876.

WM. C. HOLGATE, Esq., *Defiance, O.*

SIR: In my letter to you, written at Phila. upwards a fortnight ago, I stated that I should be in Defiance on or about the 1st of Oct. for the purpose of settling up the land matter with you and
187 Mr. Newbegin, but inasmuch as you have made no response to any of my three last letters, I do not know that my visit there would ecure a settlement of the matter, hence this letter.

If you will write me positively and definitely on this subject, stating whether you and Mr. Newbegin will agree to pay to me on or about the 1st of next month, Oct., the amount of the two notes, with interest on the same from the date they were given to the date of payment, I will make arrangements to be in Defiance on or about the date above stated, otherwise I shall not go to Defiance just at present.

The notes, together with the mortgage, will be sent to me, and everything will be prepared for an immediate settlement, if you agree to do so.

My mother stated in a letter to me that if you wanted to use the money till the 20th of June, '77, at 10 per cent., she would let you have it till that date.

I make special request that you favor me with an immediate answer to this, it would be conferring a great favor. Address as headed.

Yours respectfully, R. I. EATON.

"EXHIBIT 22."

FRYEBURG, *Sept.* 2, 1876.

HENRY NEWBEGIN, Esq., *Defiance, O.*

MY DEAR SIR: The deed signed by me nearly two years ago was signed yesterday by Mrs. E., and duly acknowledged before a jus-
188 tice of the peace, and will be forwarded to-day to the secretary of State at Augusta for the proper certificate, and then forwarded to you. I have not mentioned the business to any of my family for more than a year, but it seems that they have at last *at last* learned wisdom, and without a word from me have desired to execute the deed and have the business closed. I am now confident that the whole difficulty (as you know I have long suspected) was occasioned by false reports from persons in Defiance, who seemed determined that Mr. Holgate should not have the land. I hope the business will now be arranged satisfactorily to all concerned. It has been a laborious business to me and anything but pleasant. The senseless litigation regarding the money paid by the railroad co. caused a dead loss of over $500. What has happened in Defiance touching this business since I was there I know nothing of; everything has been kept a secret from me. As to the case involving the mill property, I know nothing of what has transpired in Defiance since I saw you. Mr. Sutpher has not written me a word about it. Will you be kind enough to write me just how the case stands in court and anything else you may think I ought to know concerning it?

In haste, yours truly, J. B. EATON.

189 "EXHIBIT 21."

OCT. 2ND, '6.

J. B. EATON, Esq., *Fryeburg, Me.*

DEAR SIR: Yours of 28th ult. received. I shall hand it to Mr. Holgate to answer as he thinks best; but wish to say that on account of the two years' delay in the execution of this deed, and reports spread by your son that we had not title to this property, we have been greatly damaged, and whether Mr. Holgate shall conclude now to accept the deed or not, for my part I do not feel called upon to put myself to great inconvenience to raise the money just when your wife or sons please to demand it, nor shall I pay a cent on those notes till I have directions in writing from you to pay the balance of the purchase money to your wife.

If we accept the land I am determined to have all controversy about it ended.

There has yet been no disposition of suit about the saw-mill.

Yours truly, HENRY NEWBEGIN.

You are mistaken about other persons here wanting that land; it can't be sold for what we paid you.

190 "EXHIBIT 18."

DEFIANCE, *Oct. 2nd* 1876.

MR. R. I. EATON, *Hamilton, N. Y.*

DEAR SIR: On my return from East a short time ago I found your postal card and letter from Cleveland and Phil'd'a, and have rec'd yours of Sept. 25th. I have made up my mind, as I indicated to her in June last, to yield to Mrs. Eaton's wishes, so far as I was concerned, and release all my rights in lands in question on having the money advanced by me on them with proper expenses first repaid to me. I will confer with Mr. Newbegin, and write you our views more fully in about 10 days. Are now, and will be till then, very busy, and absent from home part of the time.

Yours respectfully, WM. C. HOLGATE.

"EXHIBIT 43."

DEFIANCE, O., *November 13th*, 1876.

MR. R. I. EATON, *Hamilton, N. Y.*

DEAR SIR: My contract with Mr. J. B. Eaton in reference to the land was such I was to be under no legal obligations to consider same as purchase of the premises, except the deed of Mrs. Eaton regularly made and joined in by him conveying the premises to me
191 was promptly executed and sent on to me. Neglect in the performance of this condition by him was to justify me in regarding his conveyance to me as merely a mortgage to be held as a lien to secure the payment of advancements ($400) already made to him, and such as might thereafter be made. Now, if that deed been sent on as agreed, I could have made an investment in that land very profitably, and there was good demand then for property in that direction, and even a year and over later had it come I think I might have secured a large factory there, but for the want of a satisfactory title parties desirous of locating it went in an adverse direction, and are now drawing the business and growth of the town there with them.

Under the circumstances, although I consider myself damaged by this non-fulfillment of the contract, all I will ask is simply to have my advancements in relation to said land reimbursed with proper interest and expenses.

Yours, &c., WM. C. HOLGATE.

Dec. 7th, 1876.—Yours of 1st inst. rec'd. I send you above which I think will sufficiently answer same, and which was writen and should have been sent some time ago, but was neglected.

Yours, &c., W. C. H.

192 "EXHIBIT 19."

HAMILTON, MADISON CO., N. Y., *Dec. 1st*, 1876.

WM. C. HOLGATE, Esq., *Defiance, Ohio.*

SIR: On the 6th Oct. last I rec'd your letter of date 2nd, same

month, in which you stated that you would confer with Mr. N. in regard to the subject-matter of my several letters to you—the land matter, and that you would in about ten days write me more fully your joint views on the same; but I hardly need add, I have not yet rec'd any word from you. I had expected you would write either to my mother or myself before this, inasmuch as I had stated in one of my letters to you that I had prevailed on her to sign for you and Mr. N. the deed to her land, and that we were ready to settle up the matter.

The two notes were due in the month of October last, and it is not desirable that the matter should remain much longer in the shape it now is; and I hope it may be settled without further trouble, and that quite soon. I wish you would state to me, in answer to this, if the legal amount of those two notes of yours & Mr. N.'s would be forthcoming should I come to Defiance on the 26th inst. I should like to know quite definitely on this point, so that there may be no misunderstanding. If you and Mr. Newbegin will give me an affirmative answer, I will be in D. on the date above mentioned, and will bring the deed with me. For the present, I leave the
193 matter as it now stands, awaiting your answer to this. I would specially ask that you please favor me with an immediate reply to this, if convenient, which would greatly oblige me.

Yours very respectfully, R. I. EATON.

"EXHIBIT 23."

J. B. Eaton. Rec'd Feb. 26, '77.

FRYEBURG, *Feb.* 23, 1877.

H. NEWBEGIN, Esq., *Defiance, Ohio.*

MY D'R SIR: I have hoped that after the execution of the *deed* to Mr. Holgate my connection with the business at Defiance would terminate, but it seems trouble will never end. Soon after the R. R. Co. had condemned a portion of the property I prepared a deed, as nearly as I could, in accordance with the terms of the contract with Mr. Holgate, signed it myself, and presented it to Mrs. Eaton for her signature, the justice being present to take the proper acknowledgement. Mrs. E. declined (or say, truthfully) refused to sign that deed. The history of the business from that time to the present, you are more familiar with than I am.

After a long time had passed, and Mrs. E. and the boys (all of whom had been misled by reports from certain persons in Defiance) were willing that Mrs. E. should sign the deed, she did so, and I supposed everything was right. It seems, however, it is not so. I am told that Mr. Holgate is not satisfied with deed, for what
194 reason I do not know, as I have not seen any correspondence regarding the matter, nor have I ever seen the deed since it was executed, nor have I ever seen the notes or mortgage which were forwarded to Mrs. E. If there is anything which has not been properly done, so far as I am concerned I wish to be informed of it, and, if in my power, I will perfect it; for, so far as you and Mr. Holgate and myself are concerned, everything has been done hon-

estly, honorably, and fairly, and, in my opinion, for the best interest of those in whose behalf I was acting. Please let me know what is *wrong* or *wanting* in the deed, so far as I am concerned. I have no doubt that Mr. Holgate has a good title by force of my deed, but I want him to be satisfied. I *want him* to *believe* and *feel* that I have acted honestly and fairly with him, and propose to continue to do so.

Please let me know how the mill case stands (curiosity). Please let me hear from you soon.

Yours truly, J. B. EATON.

P. S. Hayes is the President. How do you like that?

"EXHIBIT 24."

FEB. 27TH, '7.

J. B. EATON, Esq., *Fryeburg, Me.*

DEAR SIR: Your favor of 23rd was duly received, and I submitted the same to Mr. Holgate. We are both entirely satisfied with your good faith in the matter, and feel that you did all in your power to carry out your part of the obligation both towards us,
195 and also that its fulfillment would have been greatly for the interest of those for whom you was trustee, but they prevented this, and now all we can say is they must accept the consequences, and we wish you to be free from all further annoyance, and leave it there if you so choose. Inclosed with the notes and mortgage, long ago sent your wife, I sent a deed also for execution in the form I wanted it, with the assurance that on its return, of course within a reasonable time, duly executed, the notes would be promptly cashed when due *by whomsoever they were presented*. She retained our notes and mortgage, but we never heard from the deed. Soon after one of your sons, claiming to act in the interests of your wife, and for her, came out here, and in an interview with me in Mr. Hill's office publicly claimed title to the land, and refused to abide by, or advise Mrs. E. to abide by, the agreement. The result was, with the title to the land *known to be in dispute*, we could not realize on it, or dispose of it for anywhere near its value, and it is not till the value of the land has so depreciated that they know and see the price we offered is far above its value that they now offer us a deed, after first, even then, trying to blackmail us by threatening suit if we did not pay them quite a sum over the original contract price. All we have to say is, that we consider the lapse of time has relieved us of any other obligation except to take the land or refuse it at our option, and we stand ready to quit-claim it back to you, or to your wife and sons if they or you wish it, on repayment of the money ad-
196 vanced on it, and paid for tax liens and taxes with interest. If they think they have any other claims on us the sooner they sue us and test it the better.

Of the condition of the mill case I cannot speak definitely only at our term of court just closed, after hearing it was continued with leave to counsel all round to file written briefs with the judge. You know I am not appearing in that case. Mr. Sutphen represents you.

You ask me what I think of the election. I think Hayes has no more legal claim to the presidency than you or I have. I was in favor of the commission, but I expected at least consistent action from it in any position it assumed, but the result is that on the same questions of law we have seen three different holdings, each one to fit the fact in hand.

I remain, yours truly, HENRY NEWBEGIN.

EXHIBIT 25.

FRYEBURG, MAINE, *Mch 19th*, 1877.

MR. NEWBEGIN.

SIR: About two years ago Mr. Eaton executed a deed to Mr. Holgate and asked me to sign it, which I declined to do. I had been informed by parties in Defiance that the property was being sacrificed. I was also advised not to be a party to any conveyance, and for a while I did heed the advice, but subsequently changed my mind, and a long time ago executed the deed and forwarded it to Mr. Holgate, who has returned it for some reason, I know not what.

Mr. Eaton says he intended to make the deed in conformity
197 with his contract with Mr. Holgate, as soon as he could, and thought he had done so, and does not now know what the objection is to the deed.

Please write and let me know what the difficulty is.

Respectfully, MRS. ELIZABETH R. EATON.

EXHIBIT 26.

DEFIANCE, OHIO, *March 24th*, 1877.

MRS. ELIZABETH R. EATON, *Fryeburg, Me.*

MADAM: Your favor of the 19th was received on yesterday. In response I have to say that long since I sent you notes and mortgage payable to you only, for the full am't back on the land as agreed upon between Mr. Eaton and Mr. Holgate, and assured you the same would be *promptly paid whenever due*, either directly to you, or to any one by whom you choose to send them, upon you and Mr. Eaton executing the deed which I drew and inclosed to you with the mortgage, &c.

This we not only repeatedly offered, but I wrote you fully explaining the matter, and urging you to unite in the conveyance, going so far as offering to go on to see you to fully explain the matter to you, at my own expense. You declined my offer and in letters directly to me persistently refused to perform your part of the contract, if it could be said there was any contract with you, which in fact there was not.

Your son came out here and publicly claimed the land as
198 yours, and denied our title, or that we had any interest in it. The result was we could not dispose it, for nobody will buy land with the title in question. We were to pay, as I always assured you, a large price for the land, but now the price would be much more than it is worth, and for myself I do not propose to

stand the loss, and hence we decline absolutely to accept your deed and pay the price. You or Mr. Eaton can have our release of all interest in the land upon repayment of what we have paid out to Mr. E., and for taxes and liens with interest since. But were we to accept a deed now I should want one with description substantially as I drew it.

Yours respectfully, HENRY NEWBEGIN.

EXHIBIT 32.

FRYEBURG, ME., *June* 20, 1877.

H. NEWBEGIN, Esq., *Defiance, O.*

D'R SIR: My family are importuning me to write to you regarding this business with you and Mr. Holgate. They are regretting the folly of their course hitherto pursued, and suffering from its consequences. They did not, or would not, foresee results, nor be advised. I write now to inquire whether the matter can be closed. Can you or will you pay a part, and take time, not unreasonably, to pay the residue? I know money is hard to get: hence this suggestion. I do not want to have or hear of any further litigation, trouble, or expense concerning this business. I have intended to do, and I believe have done, everything in my power to carry out in
199 good faith my part of all stipulations between you and Mr. Holgate and myself. The cause of my failure in some respects to do so, you fully understand. I prepared the deed with great care, to make it conform to our contract, and do not understand that there is any objection to its *form and purport*. My health is poor, and it would be gatifying to me to have this business settled.

Yours truly, J. B. EATON.

"EXHIBIT 33."

JUNE 23RD, '7.

J. B. EATON, Esq., *Fryeburg, Me.*

Your favor of the 20th inst. is at hand. I fully recognize, so far as I have been connected with the matter (and, I presume, also in your relations with Mr. Holgate), that you have done all in your power to fulfill your contract. Having done this, it seems to me that you are not called upon to give yourself any uneasiness in the matter. You say your family did not foresee results, &c., or they would not have taken the course they did; but we did "foresee results," and, as I have heretofore written, anticipating a decline in the value of the property, I repeatedly urged your wife and son to conform with their part of the contract (by the execution of a deed), that we might be enabled to dispose of the property advantageously (with the title known to be in dispute we could not sell it). This they would not do. Now I feel that they must bear the loss, not Mr. Holgate and myself; but I will hand your letter to Mr.
200 H. for answer, and whatever he may please to do I will agree to.

Yours truly, HENRY NEWBEGIN.

EXHIBIT 34.

FRYEBURG, *July* 17, 1877.

W. C. HOLGATE, *Defiance, O.*

MY DEAR SIR: I have not corresponded with you much directly, because whatever communication has seemed necessary between us has been through Mr. Newbegin, with whom the correspondence commenced, and whose personal knowledge of and direct interest in our business transactions have made it proper that he should act in that way and perform that service.

It seems the business is not settled, though I have known very little about it since I saw you in Ohio. I should not now mention it but for the earnest solicitation of Mrs. E. and the boys, who appear quite repentant of their folly heretofore persisted in without the least cause or justification.

Having endeavored to carry out my part of the stipulations in this business in good faith, and for the best interests of all concerned, and having failed to secure the approbation which ought to have been accorded for faithful services, I desire to have no further concern in the matter. At the same time, I should be indeed glad if the whole business could be closed without further trouble or expense, and in a way to be satisfactory to all concerned. To
201 this end I have consented to write to *Mr. Newbegin* (some time ago), and now write to you. I wish to add that I have done everything in my power to carry out to the letter my arrangements with you, and believe you have been willing to do the same with me, and that there is no excuse or palliation for the conduct of my family in this business; especially do I believe that you have a good and perfect title to the Defiance property by virtue of the deed I gave you; still, the other ought to have been furnished, as we both intended.

I made a suggestion to Mr. Newbegin, which he has probably communicated to you, and shall be pleased to hear from you.

Yours truly, J. B. EATON.

"EXHIBIT 51."

DEFIANCE, OHIO, *July 23rd*, 1877.

DEAR SIR: As to contract between you and Mr. Newbegin and myself, for reasons indicated to your son and wife, in whom the real interest seems to be, we have considered at an end, so far as any obligation on our part exists for its fulfilment.

As to whether we will entertain thought of a "*new deal*" is matter I will consider with Mr. N., if that is wished by parties interested.

Believe me as entertaining the greatest esteem and respect for yourself.

WM. C. HOLGATE.

MR. J. B. EATON, *Fryeburg, Me.*

202 EXHIBIT 27.

FRYEBURG, *Aug.* 21, 1877.

HENRY NEWBEGIN, ESQ., *Defiance, Ohio.*

MY DR SIR: I have but a moment to write, as my mother is

in a dying condition, and I must be with [her] (7 miles from here). My family difficulties are approaching a crisis. Should Mrs. E. or the boys, or any one on their behalf, or on behalf of any of them, call on you or Mr. Holgate, or either of you, for money, or regarding any matters involved in or connected with the sale of the Defiance property, please say to them that you will do nothing except on *written order* from me. Of course I shall say nothing derogatory to my family unless compelled. When explanation for the above request becomes necessary, I will make it.

Whenever you find that I have done, or am doing, any wrong, dishonest or dishonorable act or thing regarding this whole Defiance business, or any part of it, then drop and *and* condemn me, but not before; don't take the say so *of my enemies* for it, but be satisfied yourselves.

In haste, yours truly, J. B. EATON.

203 "EXHIBIT 35."

AUG. 22, '7.

J. B. EATON, Esq.

DEAR SIR: Yours of 20th is just at hand. We certainly will pay no money to any one without your consent, or under decree of court in suit wherein you are a party. Mr. Holgate's contract was with you, and the first arrangement to pay to your wife was with your approval. Afterwards it was plain to my mind that if we paid others than you, there was nothing to prevent you still from recovering the purchase price. But for reasons stated in my last to you, we consider the contract of purchase re-cinded, and hold possession under our tax deed, and shall treat the deed from you merely as a security for the money we advanced.

Yours very truly, HENRY NEWBEGIN.

"EXHIBIT 37."

$400.00. DEFIANCE, OHIO, *July 30th*, 1874.

Ninety days after date we jointly and severally promise to pay to the order of the Defiance National Bank, at its office, four hundred dollars, value received.

J. B. EATON.
WM. C. HOLGATE.
HENRY NEWBEGIN.

204 Endorsed: Pay to order of William C. Holgate and Henry Newbegin, sureties within, without recourse. Defiance National Bank, by E. Squire, cas.

"EXHIBIT 36."

Warranty Deed.

Know all men by these presents, that John B. Eaton, of the county of Oxford, and State of Maine, in consideration of the sum of six thousand dollars to him paid by William C. Holgate, the receipt

whereof is hereby acknowledged, does hereby grant, bargain, sell, and convey to the said William C. Holgate, his heirs and assigns, forever, the following real estate, situated in the county of Defiance, in the State of Ohio, and bounded and described as follows: All that part of the east half of section No. twenty-seven (27), in township four (4) north, range four (4) east, lying between the Fort Wayne road and the Wabash and Erie canal, and containing ninety-five acres of land, more or less, excepting that portion of said tract commencing at the east quarter post of said section twenty-seven, running thence west six chains and eighteen links to the railroad, thence southwesterly along the line of the railroad seventeen chains and twenty-six links, thence south fifteen degrees east five chains and forty-one links, thence north five chains to the place of beginning, containing $12\frac{75}{100}$ acres, and also excepting the five acres of land known as the Weisenberger mill lot, at lock No. (6) six
205 of canal. It being intended hereby to convey the same lands described in deed of sheriff of said county recorded in vol. 22, pp. 61, 63 of record of deeds of said county. To have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to the said William C. Holgate, his heirs and assigns, forever. And the said John B. Eaton, for himself and his heirs, do hereby covenant with the said William C. Holgate, his heirs and assigns, that he is lawfully seized of the premises aforesaid; that the said premises are free and clear from all incumbrances whatever, and that he will forever warrant and defend the same, with the appurtenances, unto the said William C. Holgate, his heirs and assigns, against the lawful claims of all persons whomsoever, except tax liens thereon.

In witness whereof, the said John B. Eaton has hereunto set his hand and seal, this 30th day of July, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN B. EATON. [SEAL.]

Signed, sealed, and acknowledged in presence of—
JONAS COLBY,
HENRY NEWBEGIN.

STATE OF OHIO, }
Defiance County, } *ss:*

Be it remembered, that on this 30th day of July, A. D. 1874, before me, the subscriber, a notary public in and for said county,
206 personally came the above-named John B. Eaton, the grantor in the foregoing deed, and acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal, on the day and year last aforesaid.

HENRY NEWBEGIN,
Notary Public.

Endorsed: Rec'd June 8th, '75. Recorded July 21st, '75, in Defiance Co.

"EXHIBIT 38."

Forfeited Land Deed.

Know ye, that whereas the real estate hereinafter described did, on the 15th day of January, A. D. 1867, become and was delinquent for the non-payment of taxes and penalty for the year A. D. 1865, and the simple taxes of the year A. D. 1866, and had been then and prior thereto duly and legally returned and advertised to be sold on the day aforesaid for said delinquent taxes and penalty;

And whereas said real estate was on the day aforesaid duly legally offered for sale at the court-house, in the county of Defiance, by the treasurer of said county for the taxes and penalty aforesaid, and not being sold for want of bidders, became and was then and there forfeited to the State of Ohio for the non-payment of said taxes and penalty;

And whereas afterwards said real estate had been duly and legally advertised to be sold as such forfeited land, on the eighth day of December, A. D. 1873, and was on said last-mentioned day,
207 at the court-house in said county, duly and legally offered for sale by the auditor of said county, and as such forfeited land, was by him then and there sold for the sum of three hundred and fifty dollars and sixty-six cents, taxes and penalty then due thereon, to Adam Wilhelm;

And whereas the auditor of said county gave to the purchaser a certificate of said sale, as required by law, which certificate has now been here produced to the undersigned;

Now, therefore, I, John H. Conkle, auditor of Defiance county aforesaid, in consideration of the premises, and the payment by said purchaser of the said sum of three hundred and fifty dollars and sixty-six cents, do hereby grant, sell, and convey unto the said Adam Wilhelm, his heirs and assigns forever, the real estate sold as aforesaid, to wit, situated in the county of Defiance and State of Ohio, and described as follows:

The east part of the east half of the southeast quarter, between Fort Wayne road and canal, in section twenty-seven (27) in town. four (4) north, range four (4) east, in said county and State.

To have and to hold the same to the said Adam Wilhelm, his heirs and assigns, forever.

In witness whereof, the said John H. Conkle, as auditor of said county, hereto sets his hand and seal officially, this 12th day of November, A. D. 1874.

JOHN H. CONKLE, [SEAL.]
Auditor of Defiance County.

Executed in presence of—
HARRISON SHAW.
CHAS. P. TITTLE.

THE STATE OF OHIO, }
Defiance County, } *ss:*

208 Before me, the subscriber, a notary public in and for the county aforesaid, personally appeared John H. Conkle,

county auditor of said county of Defiance, and as such acknowledged the above instrument to be his official act and deed, for the purposes therein expressed.

Given under my hand, this twelfth day of November, A. D. 1874.

CHAS. P. TITTLE,
Notary Public.

AUDITOR'S OFFICE, DEFIANCE COUNTY, OHIO.

I, Jnos. H. Conkle, auditor of Defiance county, Ohio, do hereby certify that at a sale of lands and town lots forfeited to the State of Ohio, made and held by me as auditor of Defiance county, at the court-house in said county, on the 8th day of December, 1873, A. Wilhelm became the purchaser of east p't E. ½, S. E. ¼, between Fort Wayne road and canal, in section 27, T. 4 N., R. 4 E., containing 75 $\frac{65}{100}$ acres, for which he paid the sum of three hundred and fifty $\frac{66}{100}$ dollars, being an amount equal to the amount of taxes, interest, and penalty due on the same.

Given under my hand officially, this 8th day of December, 1873.

JNO. H. CONKLE,
Auditor Defiance County, O.

No. 733. TREASURER'S OFFICE, DEFIANCE COUNTY, OHIO,
DEFIANCE, *Jan. 8th*, 1875.

Received of Adam Wilhelm, in full, taxes as follows, to wit:

R. 4, T. 4, S. 27.
Description—P't E. ½, S. E. ¼, bet. F't Wayne & canal.
Acres, 75.65.
Value, 1,492.
1874, 31.34.

H. SHAW,
Treas. Defiance Co.

Endorsed: Rec'd for record Nov. 17, 1874. Recorded Dec. 17th, 1874, in Defiance Co.

209 "EXHIBIT 44."

Quit-Claim Deed.

Know all men by these presents, that I, William C. Holgate, of the county of Defiance, and State of Ohio, in consideration of the sum of fifteen hundred dollars to me paid by Henry Newbegin, of said county, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quit-claim to the said Henry Newbegin, his, heirs, and assigns forever, the following real estate situated in the county of Defiance, in the State of Ohio, and in the township of Defiance, and bounded and described as follows, viz., the undivided one-half of all that part of the east half of section No. twenty-seven (27), in township (4) north, range four (4) east, lying between the (old) Fort Wayne road and the Wabash and Erie canal, and containing ninety-five acres of land, more or less, excepting that portion of said tract commencing at the east quarter-post of said section twenty-seven (27), running thence west six chains and eighteen

links to the railroad, thence southwesterly along the line of the railroad seventeen chains and twenty-six links, thence south fifteen degress (15°) east five chains and forty-one links, thence north five chains to the place of beginning, containing $12\frac{75}{100}$ acres. And also excepting the five acres of land known as the Weisenberger mill lot at lock No. six of the canal. It being intended to convey thereby the undivided one-half of the same lands conveyed to me by
John B. Eaton by his deed dated July 30th, 1874, and re-
210 corded in vol. 23, pp. 452 & 453 of record of deeds of said county. To have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to the said Henry Newbegin, his heirs and assigns forever.

In witness whereof, the said William C. Holgate has hereunto set his hand and seal, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-five.

WM. C. HOLGATE. [SEAL.]

Signed, sealed, and delivered in presence of—
E. P. HOOKER.
A. F. ALPRESS.

STATE OF OHIO, }
Defiance County, } ss:

Be it remembered that on this 15th day of September, A. D. 1875, before me, the subscriber, a notary public in and for said county, personally came the above-named William C. Holgate, the grantor on the above instrument, and acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year last aforesaid.

EDWARD P. HOOKER,
Notary Public for said County.

Endorsed: Rec'd Sept. 20th, 1875. Recorded Oct. 26th, 1875. In Defiance county. Record of deeds, vol. 25, on pages 29 & 30. Lewis Neill, recorder.

211 "EXHIBIT 45."

Know all men by these presents, That John B. Eaton and Elizabeth R. Eaton, his wife, of Fryeburg, State of Maine, in consideration of the sum of thirty-eight hundred dollars to them paid by William C. Holgate and Henry Newbegin, of Defiance county, State of Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said William C. Holgate and Henry Newbegin, their heirs and assigns, forever, the following-described real estate and lands, situate in the county of Defiance and State of Ohio, to wit:

All that part of the east half of section twenty-seven, in township four (4) north, range four (4) east, between the Fort Wayne road and Wabash and Erie canal, containing ninety-five acres of land, more

or less; excepting therefrom twelve and $\frac{55}{100}$ acres, more particularly described in deed from George M. Weisenberger to Michael Gorman, dated September 27th, 1865, and recorded in vol. 15, page 7, of records of deeds of said county; also excepting about five acres, known as the mill property, on which the Weisenberger saw-mill is located; also excepting whatever right of usies in that portion of the above-described premises lying north of the Toledo, Wabash and Western railway track has been acquired by the Baltimore, Pittsburg and Chicago Railway Company (Ohio division), under proceedings had in the probate court of said county, in which said company was petitioner against three grantors and others.

212 And for the said consideration this deed is executed in lieu of deed heretofore executed by said John B. Eaton to said William C. Holgate, for that the said Elizabeth R. Eaton claims to have title in equity to the said lands, and for the purpose of conveying to the said grantees all and singular the right, title, and interest of the said Elilabeth R. Eaton as well as of said John B. Eaton in and to the said lands and premises, and all the estate, title, and interest of the said John B. Eaton and Elizabeth R. Eaton, either in law or equity, of, in, and to the said premises, together with all the priveleges and appertenances to the same belonging, and all the rents, issues, and profits thereof, to have and to hold the same to the only proper use of the said William C. Holgate and Henry Newbegin, thier heirs and assigns forever.

And the said John B. Eaton and Elizabeth R. Eaton for themselves, and for their heirs, executors, and administrators, do hereby covenant with the said William C. Holgate and Henry Newbegin, their heirs and assigns, that they are the true and lawful owners of the said premises, and have full power to convey the same: that the title so conveyed is clear, free, and unincumbered; and further, that they will warrant and defend the same against all claim or claims of all persons whomsoever, except tax lien of one Adam Wilhelm, and taxes since assessed thereon.

In witness whereof, the said John B. Eaton and Elizabeth R. Eaton, as joint grantors, have hereunto set their hands and seals, this first day of October, in the year of our Lord one thousand eight hundred and seventy-four.

213 ——— ———. [SEAL.]
——— ———. [SEAL.]

Signed, sealed, & acknowledged in presence of us.

——— ———.

——— ———.

THE STATE OF MAINE, }
County of ——, } *ss.*

Be it remembered that on the — day of ——, in the year of our Lord one thousand eight hundred and sixty-five, before me, the subscriber, a —— in and for said county, personally came John B. Eaton and Elizabeth R. Eaton, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary

act and deed for the use and purposes therein mentioned. And the said Elizabeth R. Eaton, wife of the said John B. Eaton, being examined by me separate and apart from her said husband, and the contents of said deed being by me made known and explained to her, as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, as her free act and deed, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year aforesaid.

214 "EXHIBIT 46."

Mortgage Deed without Dower.

Know all men by these presents, that William C. Holgate and Henry Newbegin, of Defiance county, State of Ohio, in consideration of three thousand dollars to them paid by Elizabeth R. Eaton, wife of John B. Eaton, of Fryeburg, State of Maine, the receipt whereof is hereby acknowledged, do hereby bargain, sell, and convey to the said Elizabeth R. Eaton, her heirs and assigns, forever, the following real estate situated in the county of Defiance, State of Ohio, to wit: That part of the east half of section twenty-seven (27), in township four (4) north, range four (4) east, lying between the Fort Wayne road and the Wabash and Erie canal, excepting therefrom all thereof lying north of the line of the F. W. & W. R'y track, and also excepting therefrom some twelve acres heretofore conveyed to one Michael Gorman, and also some five acres upon which the Weisenberger saw-mill stands, and which lands, with the parts so excepted, are more particularly described in deed of this date of said John B. Eaton and Elizabeth R. Eaton conveying the same to these grantors, it being intended hereby to convey the same lands as in said deed are described, and to secure a part of the purchase price of which this mortgage deed is executed, together with the privileges and appurtenances to the same belonging; to have and to hold the same to the said Elizabeth R. Eaton, her heirs and assigns, forever, hereby covenanting that the title so conveyed is clear,
215 free, and unincumbered by any act of ours heretofore, and that we will warrant and defend the same against all claims whatsoever of all persons holding through or under us; provided always, and these presents are upon this condition: That whereas said William C. Holgate and Henry Newbegin have this day made and delivered to said Elizabeth R. Eaton their two certain promissory notes of even dates herewith for the following sums of money, to wit: One for $1,500.00, payable in — year from date at Defiance National Bank, with interest payable annually; the other for $1,500.00, payable in two years from date in the same manner and same interest. Now, if the said William C. Holgate and Henry Newbegin shall pay said notes, with interest, as therein set forth, then these presents shall become void; otherwise to remain in full force and virtue.

In witness whereof, the said William C. Holgate and Henry New-

begin have hereunto set their hands and seals, this first day of October, in the year eighteen hundred and seventy-four.

WM. C. HOLGATE. [SEAL.]
HENRY NEWBEGIN. [SEAL.]

Signed, sealed, and delivered in presence of—
D. L. BELL.
C. B. SQUIRE.

THE STATE OF OHIO, }
Defiance County, } ss:

Be it remembered that on the —— day of ——, in the year of our Lord one thousand eight hundred and seventy-five, before me,
216 the subscriber, a notary public within and for said county, personally came William C. Holgate and Henry Newbegin, the grantors in the above conveyance, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the purpose therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year aforesaid.

[SEAL.] C. B. SQUIRE,
Notary Public in and for said County.

Endorsed: Recorder's office, Defiance county, Ohio. Received for record Oct. 24th, 1877, at 9½ o'clock a. m., and recorded in vol. 12 of Mortgages, pp. 148. W. E. Carpenter, recorder.

$1,500.00. DEFIANCE, OHIO, *Oct. 1st*, 1876.

One year after date we promise to pay to Elizabeth R. Eaton, at Defiance National Bank, fifteen hundred dollars, with interest payable annually, value received.

WM. C. HOLGATE.
HENRY NEWBEGIN.

$1,500.00 DEFIANCE, OHIO, *Oct. 1st*, 1876.

Two years after date we promise to pay to Elizabeth R. Eaton, at Defiance National Bank, with interest payable annually, value received.

WM. C. HOLGATE.
HENRY NEWBEGIN.

217 "EXHIBIT 53."

Mortgage Deed, with Dower.

Know all men by these presents, that George M. Weisenberger, of the county of Defiance, in the State of Ohio, in consideration of two thousand dollars ($2,000) to him paid by Bartley Campbell, of the county of Hamilton, in said State of Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Bartley Campbell, his heirs and assigns, forever, the following real estate, situate, lying, and being in the county of Defiance,

in the State of Ohio, to wit: All that part of the east half of section twenty-seven (27), township four (4) north, range four (4) east, lying between the Fort Wayne road and the Wabash and Erie canal, and containing ninety-five (95) acres of land, more or less, being the same property conveyed to Sarah Baker, by Bartley Campbell and Anna, his wife, by deed dated Dec. 9th, 1861, and recorded in Book No. 11, pages 196 & 197 of the Deed Records of said Defiance county, and to said Bartley Campbell, by Moses C. Judkins and Eliza Jane, his wife, by deed dated *Nov. 19th*, 1861, recorded in vol. 10, pages 532 & 533 of said records, and also by deed of quit-claim from the same grantors, dated *Dec. 18th*, 1861, and recorded vol. 11, pages 74 & 75 of said records. Also the following-described lands, viz: All that part of the northwest quarter of section No. thirty-four (34), town. No. four (4) north, of range No. four (4) east, that lies northwesterly of the center of the Wabash and Erie canal, passing through said quarter sections, containing ninety acres of land, more or
218 less, situated in Defiance county, and State of Ohio. Also the following real estate, situated in said county of Defiance, and State of Ohio, and described as follows, to wit: The undivided half of five acres of land, in section twenty-seven, in township four (4) north, of range four east, commencing in the centre of the Wabash and Erie canal, at the head of lock No. six, from the Maumee river, thence a southwesterly direction, in the centre of said canal, twenty-six rods, thence at right angles with said canal so far in a northwesterly direction that a line running parallel with said canal easterly twenty-six rods will contain five acres, in which is included and excepted one and one-half acre of land belonging to the State of Ohio, and except one-fourth of an acre on the northeast side of said lot, which was heretofore sold to William Rennion; and all the estate, title, and interest of the said George N. Weisenberger, either in law or in equity, of and in, and to the said premises, together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the only proper use of the said Bartley Campbell, his heirs and assigns, forever. And the said George N. Weisenberger, for himself, and for his heirs and assigns, does hereby covenant with the said Bartley Campbell, his heirs and assigns, that he is the true and lawful owner of the said premises, and has full power to convey the same, and that the title so conveyed is clear, free, and unincumbered; and, further, that he will warrant and defend the same against all claim or claims of all persons whomsoever: provided, nevertheless, that whereas the said George N. Weisenberger has executed his three several promi-
219 issory notes of even date herewith to the said Bartley Campbell for the payment of the following sums of money at the times following, viz: One note, payable on the first day of May, 1866, for the sum of six hundred dollars ($600.00); one note, payable on the fifteenth day of September, in the year 1866, for the sum of seven hundred dollars ($700.00);—payable on the 15th day of March, A. D. 1867. All the above notes, with use, and given for to secure the purchase-money of the first-mentioned piece or parcel of land. Now, if the said George M. Weisenberger shall pay the above-

mentioned notes according to the tenor and effect thereof, then these presents to be void and of no effect.

In witness whereof, the said George M. Weisenberger, together with Barbara Weisenberger, who hereby releases her right and expectancy of dower in the premises, have hereunto set our hands and seals, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-five.

G. M. WEISENBERGER. [SEAL.]
LORBOWER WEISENBERGER. [SEAL.]

Signed, sealed, and acknowledged in presence of us.
HENRY HARDY.
JOSEPH GRASSELL.

STATE OF OHIO, }
Defiance County, } *ss:*

Be it remembered that on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-five, before me, the subscriber, a notary public, personally came George M. Weisenberger and Barbara Weisenberger, the grantors in the foregoing mortgage deed, and acknowleged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned; and the said Barbara Weisen-
220 berger, wife of the said George M. Weisenberger, being examined by me, separate and apart from her said husband, and the contents of said mortgage being by me made known and explained to her, as the statute directs, declared that she did voluntary sign, seal, and acknowledge the same, and that she is still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name, and affixed my notarial seal on the day and year aforesaid.

[SEAL.] HENRY HERAY,
Notary Public.

DEFIANCE, OHIO, *Sept. 28th*, 1865.

For a valuable consideration I hereby assign to and release all my right, title, and interest of and to the following described real estate mentioned in this mort. deed, viz: Commencing at the east quarter post of section twenty-seven, township No. four north, of range four east, and running thence west six chains and eighteen links, thence north 9° west forty-four links to the railroad, thence southwesterly along the line of the railroad seventeen chains and twenty-six links, thence south 15° east five chains and forty-one links, thence north 65° east twenty-one chains and fifty links, thence north five chains to the place of beginning, containing twelve acres and seventy-five hundredths ($12\frac{75}{100}$). The intention of the above release is to release the above described land from the effects of this mortgage.

BARTLEY CAMPBELL.

For a valuable consideration I hereby assign to John B.
221 Eaton, in trust for Mrs. E. R. Eaton, the wife of J. B. Eaton,

and their children, all my right, title, and interest in the premises described in the within mortgage, also in and to the within mortgage, and the three notes thereby secured, to be held by said John B. Eaton for the benefit of the said E. R. Eaton and children, according to the provisions of the will of William A. Allen, dec., probated in Warren county, and there and also in Ham. Co. recorded. The amount of these notes when paid to be applied to the desires of said E. R. Eaton and children, against either Brysey or Mrs. S. Baker. This is to be held by said John B. Eaton until all the parties interested, including J. B. Eaton, agree, or there is some decree of court touching the disposition thereof.

Cincinnati, Nov. 2, 1865.

BARTLEY CAMPBELL.

Endorsed: Rec'd Sept. 28th, 1865, at 9.20 o'clock a. m. Recorded Oct. 2nd, 1865, in Defiance Co. Records, vol. 5, page 538. Sam'l W. Wilson, recorder.

$600.00. DEFIANCE, *Sept.* 27, 1865.

On the first day of May, A. D. 1866, I promise to pay Bartley Campbell, or order, six hundred dollars, for value received, with use.

G. M. WEISENBURGER.

Secured by mortgage, duly stamped.

$700.00. DEFIANCE, *Sept 27th*, 1865.

On the fifteenth day of September, A. D. 1866, I promise to pay Bartley Campbell, or order, seven hundred dollars, value received, with use. G. M. WEISENBURGER.

Secured by mortgage, duly stamped.

222 $700. DEFIANCE, *Sept. 27th*, 1865.

On the fifteenth day of March, A. D. 1867, I promise to pay Bartley Campbell, or order, seven hundred dollars, for value received, with use.

G. M. WEISENBURGER.

Secured by mortgage, duly stamped.

Deed—John B. Eaton to Wm. C. Holgate and Henry Newbegin.

Know all men by these presents, that John B. Eaton and his wife, Elizabeth R. Eaton, of Fryeburg, Oxford county, and State of Maine, in consideration of six thousand dollars to them paid by William C. Holgate and Henry Newbegin, of Defiance county, and State of Ohio, the receipt whereof is hereby acknowledged, have bargained and sold, and do hereby convey, to the said William C. Holgate and Henry Newbegin, their heirs and assigns, the following described real estate, namely:

All that part of the east half of section twenty-seven (27), in township No. four (4) north, range No. four (4) east, lying between the Toledo, Wabash and Western railway and the Wabash and Erie canal, containing eighty acres, more or less, excepting from this con-

veyance that part of said premises heretofore and now claimed by Michael Gorman, of said Defiance, and also excepting five acres, (with the improvements thereon) known as the Weisenburger mill lot, at lock No. six (6) on said canal, the intention being to convey to the grantees herein all the property and interest which
223 was conveyed to the said John B. Eaton by sheriff deed, dated May 20th, 1870, and recorded in the land records of said Defiance county, in Book No. 22, pages 61, 62, and 63, excepting as hereinbefore excepted; and also excepting that part of said half section lying northwest of said railway.

To have and to hold the aforegranted premises unto the said William C. Holgate and Henry Newbegin, their heirs and assigns, they, the said Holgate and Newbegin, assuming and agreeing, in addition to the consideration aforesaid, to pay whatever amount of taxes legally assessed upon said premises may remain unpaid, including the claim, so far as the same may be legal, of Adam Wilhelm. And the said John B. Eaton, for himself and his heirs, doth hereby covenant with the said Holgate and Newbegin, their heirs and assigns, that he is lawfully seized of the above-granted premises; that the same are free and clear of all incumbrances, except taxes; and that he will warrant and defend the same unto the said Holgate and Newbegin, their heirs and assigns, against the lawful claims of all persons claiming from or under the grantors herein, or either of them, (excepting tax liens, if any,) and from all claims of any of the children of said grantors, or of any person claiming from or under them, or either of them.

In testimony whereof, the said John B. Eaton and Elizabeth R. Eaton have hereunto set their hands and seals, this first day of October, in the year of our Lord one thousand eight hundred and seventy-four.

224 JOHN B. EATON. [SEAL.]
ELIZABETH R. EATON. [SEAL.]

Signed, sealed, & delivered in presence of—
SETH W. FIFE.
W. H. ABBOTT.

STATE OF MAINE, }
Oxford County, } ss:

Be it remembered that on this twenty-seventh day of September, A. D. 1876, before me, the subscriber, a justice of the peace in and for said Oxford county, personally came the above-named John B. Eaton and Elizabeth R. Eaton, the grantors in the foregoing deed, and acknowledged the signing and sealing of the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said Elizabeth R. Eaton, wife of the said John B. Eaton, being at the same time examined by me separate and apart from her said husband, and the contents of said instrument being by me made known and explained to her, then declared that she did voluntarily sign, and seal, and acknowledge, the same, and that she is still satisfied therewith as her voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name, on the day and year last aforesaid.

SETH W. FIFE,
Justice of the Peace.

STATE OF MAINE:

I hereby certify that Seth W. Fife, Esq., whose name is
225 borne upon the paper hereunto annexed, and whose signature thereto I believe to be true and genuine, was, on the date thereof a justice of the peace within and for the county of Oxford, duly commissioned and qualified, and that all his official acts are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State.

[SEAL.] J. O. SMITH,
Dep. Sec'y of State.

Oct. 1st., 1874.

Endorsed, also, Defiance, Ohio, Dec., 8th, 1877. R. L. Eaton, agent, &c., for Elizabeth R. Eaton. The within deed just rec'd from you I find too tardy to satisfy law, and too insufficient to accord with the higher attributes of equitable jurisprudence, and hence I hasten to return it to you. Wm. C. Holgate.

Quit-claim Deed.

Know all men by these presents, that we, Adam Wilhelm, with his wife hereinafter named, of the county of Defiance, and State of Ohio, in consideration of the sum of four hundred dollars to them paid by Henry Newbegin, of said county, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quit-claim to the said Henry Newbegin and William C. Holgate, their heirs and assigns, forever, the following real estate, situated in
226 the county of Defiance, in the State of Ohio, and bounded and described as follows:

All that part of the east half of section twenty-seven (27), in township four (4) north, range four (4) east, between the old Fort Wayne road and Wabash and Erie canal, containing ninety-five acres of land, more or less, excepting therefrom twelve and seventy-five one hundredths ($12\frac{75}{100}$) acres owned by one Michael Gorman. It being intended hereby to convey the same lands conveyed to said Wilhelm by auditor's deed dated on or about Nov. 12th, 1876, under sale of forfeited lands to the State of Ohio, made December 8th, 1873; to have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to the said Henry Newbegin and William C. Holgate, their heirs and assigns, forever.

In witness whereof, the said Adam Wilhelm, Mary A. Wilhelm, husband and wife, have hereunto set their hands and seals, this 15th day of June, in the year of our Lord one thousand eight hundred and seventy-five, after erasures.

ADAM WILHELM. [SEAL.]
MARY A. WILHELM. [SEAL.]

Signed, sealed, & delivered in presence of—
KATIE WILHELM.
G. L. MYERS.

STATE OF OHIO, }
Defiance County, } ss:

Be it remembered that on this 15th day of June, A. D. 1875, before me, the subscriber, a notary public in and for said county, personally came the above-named Adam Wilhelm and his wife,
227 Mary A. Wilhelm, the grantors on the above instrument, and acknowledged the signing and sealing of the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said Mary A. Wilhelm, wife of the said Adam Wilhelm, being at the same time examined by me separate and apart from her said husband, and the contents of said instrument being by me first made known and explained to her, then declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, on the day and year last aforesaid, after the erasures and interlineations therein above made.

GILBERT S. MYERS,
Notary Public.

Endorsed: Rec'd for record June 15, '75. Recorded July 28, 1875, in Defiance Co. Record of Deeds, vol. 23, & on pp. 477 & 478. Lewis Neill, recorder.

EXHIBIT 54.

Allen Will.

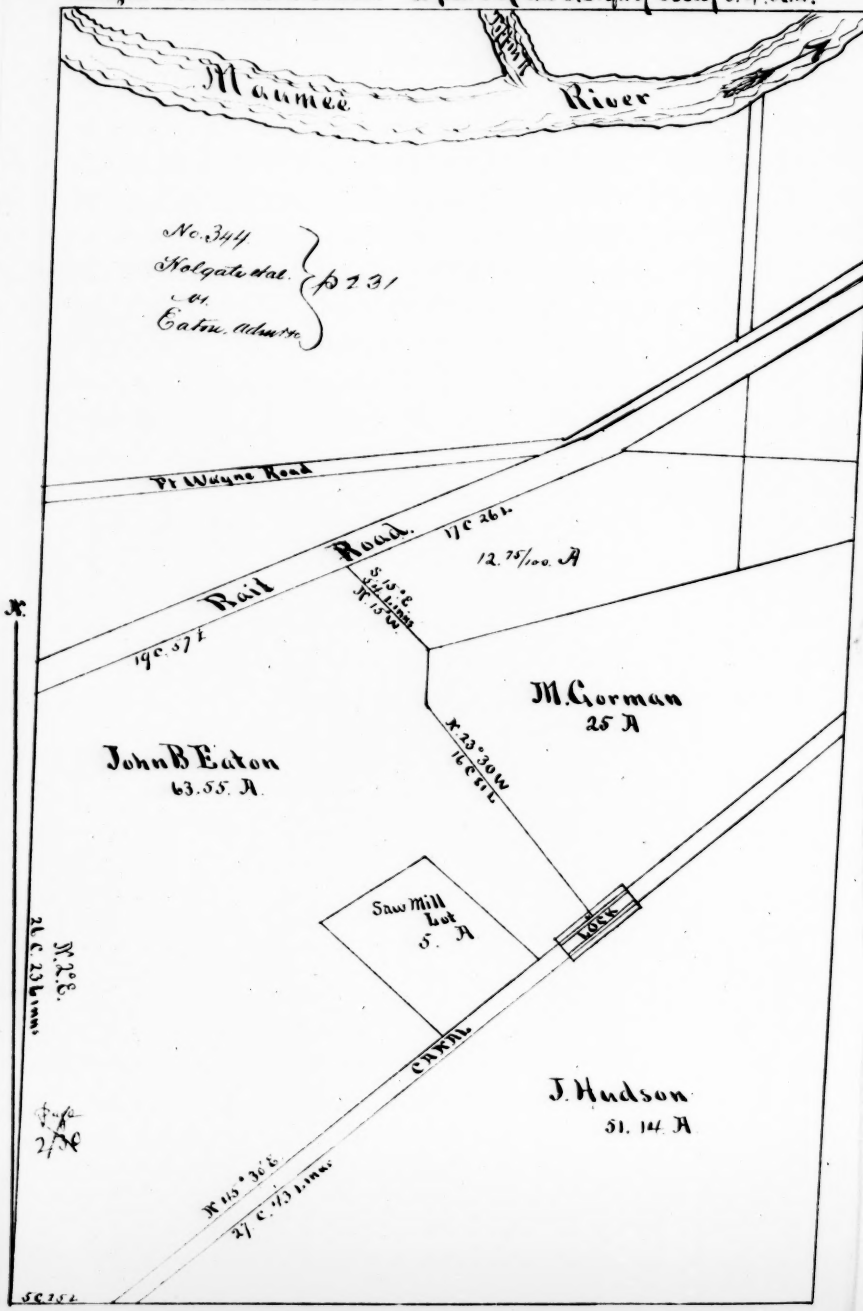
Clause of the will of William A. Allen referred to in master's report.

Item 6th. I give and bequeath to my sister, Elizabeth R. Eaton, the one-half of the remainder of my estate, after paying the aforesaid legacies and all expenses incident to the settlement of
228 my estate, the said one-half hereby bequeathed to my sister, Elizabeth R. Eaton, to be to her in her own right during her natural life, and at her death, to be equally divided amongst her five children as follows: To her son John, one-fifth part; to her son Alonzo, one-fifth part; to her son Rufus, one-fifth part; to her son Lewis, one-fifth part; to her son Horace, one-fifth part; and if either of said sons of my sister, Elizabeth, shall die before their mother, or without issue, then the survivors to have his part or share, and if my brother-in-law, J. B. Eaton, puts in a claim against me or my estate for any debt he may claim of me, or any other person for him, then such debt or claim, and all cost that may accrue in consequence thereof, or be recovered of my estate, to be paid out of that part of my property herein bequeathed to his wife and children.

Survey made for Holgates Newbegin May 31. 1875.

by English Co Sur.

Being the Jno. B Eaton Tract:- a part of the S.E. qr. of Sec 27 T. 4 R. 4.



229 *Bond.*

ELIZABETH R. EATON
vs.
WILLIAM C. HOLGATE and HENRY NEWBEGIN.

Know all men by these presents, that we, William C. Holgate, Henry Newbegin, and Edward P. Hooker, of Defiance county, and State of Ohio, are held and firmly bound unto Rufus I. Eaton, as administrator of the estate of Elizabeth R. Eaton, deceased, in the sum of two thousand dollars, to be paid to the said Rufus I. Eaton, as administrator aforesaid, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 24th day of February, A. D. 1882.

Whereas the above-named William C. Holgate and Henry Newbegin, have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the northern district of Ohio, eastern division thereof; and

Whereas said appeal was allowed said defendants, and execution of said decree stayed by the said circuit court on the execution by the said defendants of a bond in the sum of two thousand
230 dollars, conditioned as required by law:

Now, therefore, the condition of this obligation is such, that if the above-named William C. Holgate and Henry Newbegin shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

WILLIAM C. HOLGATE. [SEAL.]
HENRY NEWBEGIN. [SEAL.]
EDWARD P. HOOKER. [SEAL.]

Sealed and delivered in presence of—
JOHN S. GREENLER.

I hereby certify on this above bond have property subject to execution at law exceeding the amount of one hundred thousand dollars ($100,000).

BENJ. L. ABELL,
Cashier Merchants' Nat'l Bank, Defiance, O.

Endorsed: Filed and approved Feb. 27th, 1882. Martin Walker, judge, &c.

(Here follows diagram, marked p. 231.)

232 *Certificate.*

UNITED STATES OF AMERICA, }
Northern District of Ohio, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States

for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the records of all the proceeding had in said court, in the cause wherein Elizabeth R. Eaton, Rufus I. Eaton, administrator of the estate of Elizabeth R. Eaton, and John B. Eaton, Alonzo L. Eaton, C. Lewis Eaton, and Horace A. Eaton, sons of the said Elizabeth R. Eaton, are the complainants, and William C. Holgate and Henry Newbegin are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Cleveland, in said district, this third day of August, A. D. 1882, and in the 107th year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 344. William C. Holgate and Henry Newbegin, appellants, *vs.* Rufus I. Eaton, administrator of Elizabeth R. Eaton, deceased. Filed 9th October, 1882.

116-33

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JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

NO. 75.

WILLIAM C. HOLGATE AND HENRY NEWBEGIN,
Appellants,
vs.
RUFUS I. EATON, ADMINISTRATOR OF ELIZABETH R. EATON, DECEASED,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT OF APPELLANTS.

HENRY NEWBEGIN,
Of Counsel.

CHICAGO:
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1885.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

Number 75.

WILLIAM C. HOLGATE AND HENRY NEWBEGIN, *Appellants,*

vs.

RUFUS I. EATON, ADMINISTRATOR, &C., *Appellee.*

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is a suit originally brought in the Circuit Court of the United States for the Northern District of Ohio, by one Elizabeth R. Eaton, now deceased; the original bill having been filed December 5, 1877, and was a suit to foreclose a mortgage claimed by the complainant to have been executed by the defendants, the present appellants, conveying certain lands, subject to a condition named therein, to the complainant. A demurrer to part of the bill and an answer were filed in the case by the defendants, denying the execution and delivery of the mortgage, the defendants alleging therein, affirmatively,

that the said mortgage deed, together with two non-negotiable notes for the sum of fifteen hundred dollars ($1,500), each of concurrent date with the mortgage, were signed and sent to the complainant to be accepted by her and delivered to her on the part of the defendants, upon the express condition that she, with her husband, who was afterward made a defendant below, one John B. Eaton, should execute and deliver to the defendants a certain deed which was drafted by the defendants and inclosed under the same cover with the mortgage to the complainant, and which deed was a conveyance of the same lands described in the mortgage, including a reversion of about thirteen acres additional, which, together, constituted certain lands, agreed to be purchased by a conditional contract of the said John B. Eaton; and it was for a balance of the purchase price of the said lands which the mortgage deed was intended to secure. It was further alleged in the answer that the conditions of the contract of sale had not been complied with, nor had the deed, upon the execution of which the mortgage was to be considered delivered, ever been executed and returned to the defendants. Other special causes of defense were set up in the answer for which see same (printed record, pp. 7 to 11 inclusive).

Concurrently with the said answer was filed a cross-bill by the defendants setting up affirmatively the same matter pleaded in the answer, and alleg-

ing further, that there was due them from the complainant and the said John B. Eaton, on account of advancements having been made to him on said contract of purchase, and for moneys paid out in discharge of tax liens upon the lands named therein, the sum of eight hundred and twenty-four dollars and twenty-four cents ($824.24), and praying that the said parties defendant thereto, to wit, John B. Eaton and Elizabeth R. Eaton, be decreed to pay back to the present appellants the said sum of money with interest; that in default thereof the same should be charged as a lien upon the lands described in the contract and the same sold in satisfaction thereof, and that the notes and mortgage sued on by the complainant be given up for cancellation. (See cross-bill printed record, pp. 12 to 17.)

To this cross-bill answer was made by the complainant, among other things admitting the receipt of the said notes and mortgage, and alleging that *a* deed had been executed and tendered to the appellants, but not averring that it was *the* deed sent with the mortgage to be executed, or that it conveyed the same lands therein described (printed record, page 20), and denying the other averments of the cross-bill, except so far as they were according to the allegations in the answer.

Concurrently with the filing of the answer to the cross-bill, replication was also made to the answer of the appellants. (Record, pp. 19 to 21.)

To this answer to their cross-bill the appellants filed exceptions. (Record, pp. 21 and 22.)

On May 7, 1879, the complainant having died intestate, and Rufus I. Eaton having been appointed administrator of her estate, a bill of revivor was filed in his name, and the appellants entered their appearance in the suit as revived. (Record, pp. 22 to 24.)

Afterwards, on the 30th day of September, 1879, the aforesaid exceptions of the appellants were sustained, and leave granted the complainant to amend within thirty days. (Record, page 25.) *No amendment, however, was ever made.*

The suit with the issues as above stated was on the 19th day of January, 1881, referred to J. D. Cleveland, Esq., as special master, to take the testimony and report to the court as to the issues. (Record, page 25.) Pending which on the 19th of February, 1881, a supplemental bill was filed making John B. Eaton, Alonzo L. Eaton, C. Lewis Eaton and Horace A. Eaton, sons of the said Elizabeth R. Eaton, parties defendant thereto, who on the same day, by the solicitors for the complainant, entered their appearance in the case, and filed their answer, averring in substance that the notes and mortgage sued on by the said Elizabeth R. Eaton were the joint property of themselves and the said Rufus I. Eaton, the then complainant, having been bequeathed to them by one William A. Allen, subject to a life interest of their mother, Elizabeth R. Eaton, deceased, the former complainant. (Record, pp. 25 to 28, inclusive.)

To this answer of the new defendants, made to the supplemental bill, no replication was ever filed.

On January 6, 1882, the special master filed in the court his report and with it the testimony he had taken in the case; to which report of the Master the present appellants excepted. (Record pp. 29 to 38 inclusive.) Neither the report nor the exceptions were considered by the court; the case coming on for hearing at the January term, 1882, the court treated the reference as if made to an examiner for the purpose of taking the testimony only, and heard the case upon the testimony returned by the Master, overruling the demurrer of the defendants to the bill and rendering his findings and decree for the complainant and against the defendants, in the sum of four thousand three hundred and ten dollars ($4,310.00) and ordering a sale of the mortgaged premises in satisfaction thereof; at the same time dismissing the cross-bill of the appellants, filed in the suit. (Record pp. 41 to 43 inclusive.)

At first a petition for rehearing was filed by each of the appellants separately (Record pp. 38 to 41 inclusive), which afterwards were waived and an appeal taken to this court (Record, page 43) and which is the appeal now before the court for hearing.

The antagonistic claim of title between the complainant, Elizabeth R. Eaton, and John B. Eaton, in the lands alleged in appellant's answer to have been conditionally sold to the defendants, as subsequently disclosed by the evidence in the case, grew out of

the following state of facts. It seems that by the will of one Willian A. Allen, who was a brother of the complainant, Elizabeth R. Eaton, certain property was bequeathed to the said complainant during her life, and at her death to vest in her five sons. (See will, Record page 124.) A part of this property bequeathed were three notes amounting to two thousand dollars, secured by a mortgage deed from one George M. Weisenberger to one Bartley Campbell, and which were assigned by the said Campbell to John B. Eaton, the defendant in this suit, in trust for the complainant, Mrs. E. R. Eaton and their children, the beneficiaries named in the will "ac- "cording to the provisions of the will of one Will- "iam A. Allen, deceased." (Record, pp. 118 to 121 inclusive.) The beneficiaries named in the will as taking this property at the decease of their mother, the complainant, were the present complainant, Rufus I. Eaton, administrator, and the new parties named on page twenty-six of the record. (See their answer, Record page 27.)

This Campbell mortgage was forelosed in the Court of Common Pleas of Defiance County by a cross-petition to which John B. Eaton, the trustee, was a party, in the case of *Van Pelt* v. *Weisenberger*, and on an order of sale issued in that case, John B. Eaton bid in the property and took a sheriff's deed therefor to himself, in his own name. Execution for costs in this case had been issued, and at the request of the defendant, Newbegin, who was then acting

as defendant, John B. Eaton's attorney, the defendant Holgate advanced sufficient money to pay the costs. (Record, pages 44, 57, 120 and 121.) Afterward Eaton came to Defiance, Ohio, and made the contract for the sale of the land so held by him to the defendant Holgate. This contract is set out in full in the bill of complaint, and is as follows:

"DEFIANCE, Ohio, July 30, 1874.

"This memorandum witnesseth, that John B. Eaton, of Fryeburg, Maine, has this day sold to Wm. C. Holgate, that part of the east half of section twenty-seven (27), T. 4, N., R. 4, E., lying between the Fort Wayne road and the W. & E. canal, and containing 95 acres, more or less, excepting 12.75 acres now held by Michael Gorman, all more fully described and set forth in a deed this day executed by said John B. Eaton to said Holgate. It is understood said Holgate is to pay for said land the sum of six thousand dollars, and any valid tax claim Adam Wilhelm may hold on said premises, one thousand dollars of which is to be paid on or before October 1st next; two thousand dollars in six months thereafter; fifteen hundred dollars ($1,500) in one year thereafter; and fifteen hundred dollars in two years thereafter, with interest from and after October first. It is further understood said Eaton is to execute another deed of warranty, his wife being joined with him as grantor in same, and to forward said deed on to H. Newbegin for said Holgate, which is to be substituted for the deed this day executed to said Holgate as aforesaid. And said Eaton agrees to send on to said Newbegin, the mortgage and notes on which the judgment was taken by which his title was acquired, in case he can find same, which are to be filed according to law.

"It is further understood and agreed that if, on or before said October first, from any cause, said Holgate shall prefer not to hold said premises on the

terms herein set forth, said Eaton agrees to re-purchase same of him, and to release any installment that is unpaid of said Holgate, or portion of same, and the obligation to pay said Wilhelm's tax claims; also to refund with interest four hundred dollars ($400.00) this day advanced on said $1,000.00 installment to come due Oct. 1st, next, and for any advancements to said Eaton by said Holgate, that is or may be made, said Holgate shall have a lien on said premises, and may hold the title for same as security till said advancements shall be adjusted. If, however, said Holgate shall be satisfied with said purchase on account of quality of land and all other particulars, he shall, at any time after sixty days, on demand of said Eaton, execute and deliver his notes for any unpaid part of said installments, secured by mortgage on the premises. It being understood that any amount the railway companies may pay over for the portion of said premises between the two railways shall be credited on the said $6,000.00 to be paid by said Holgate, or to go to said Eaton, less advancements aforesaid, if said Holgate shall prefer to release and reconvey his interest in the premises aforesaid. Given under our hands and seals, the day and year above written.

"J. B. EATON (SEAL).
"WM. C. HOLGATE (SEAL)."

(Record, p. 1).

The $400 advanced by Holgate on the contract at the time of its date, to Eaton, included the $120. to $130. formerly advanced to pay off the costs of the suit. The notes and mortgage mentioned in this contract "on which the judgment was taken by which his title was acquired" and "which are to be filed according to law" were the Campbell notes and mortgage, which were taken by this agreement to be filed among the papers in the case of *Van Pelt* v. *Wiesenberger*, as is required (as some members of

this court well know), under the practice in Ohio. It will be seen that the contract price of this land, amounting to about 77¼ acres (for description see Exhibit 36, Record, p. 111, in connection with the contract) was $6,000. The B. P. & C. Ry. Co. had already instituted proceedings, or were about so to do, to appropriate about 13 acres of this land, lying north of the T. W. & W. Ry. and south of the old Fort Wayne road, for railway purposes; hence the provision that whatever the jury awarded as damages in that proceeding should be applied as part of the purchase price. This sum was afterward found to be $2,600, which, with the $400, advanced, left $3,000 as balance due for the purchase price of the land described in the contract.

After the execution of the contract Holgate assigned a half interest therein to his co-defendant, Newbegin.

The complainant, Elizabeth R. Eaton, having failed and refused to join with the defendant, John B. Eaton, in the execution of the deed named in the contract "to be substituted" for the one delivered with the contract to Holgate by Eaton, two non-negotiable notes for the $3,000 balance due of the purchase money and the mortgage sued on, were signed by the appellants and with the consent of John B. Eaton sent to the complainant, payable to her at the Defiance National Bank, to be retained by her upon the condition that she joined with her husband, John B. Eaton, in the execution of the deed de-

scribed in the contract, and returned it to the appellants; a draft of the deed was inclosed and sent with the notes and mortgage. This deed conveyed the land described in the contract excepting the easement acquired by the railroad. (See Exhibit 45, p. 115.) These notes and mortgage were dated back to the time named in the contract, October 1, 1874, but were actually written and forwarded on the 8th day of June, 1875. (See Exhibit 1, Record, p. 92, and Exhibit 40, page 95.)

Neither this deed so written and forwarded with the notes and mortgage, nor any other deed covering the same description of the land named in the contract, was ever executed or tendered to the appellants; but instead thereof a deed signed and sealed by John B. Eaton and his wife was received by the appellant Holgate about December 8, 1877, the date of his indorsement thereon, perhaps intended for 1876 (exhibit record, pp. 121 to 123), not containing in the description the land appropriated by the railroad company. The mortgage sued on was filed for record in the recorder's office, at Defiance, October 24, 1877 (record, p. 118).

By reference to the plat (record, p. 124), the description referred to above will be better understood. —The railroad referred to in the plat is the T. W. & W. R. R. The land contracted to be sold by J. B. Eaton to Mr. Holgate extended north of this R. R. to the Fort Wayne road, including the triangular piece (about 13 acres) between the R. R. and Ft.

Wayne road. It was this triangular piece which was appropriated by the new B. P. & C. Ry. Co. The mortgage sued on did not include this tract, but the draft of the deed sent with the mortgage and notes to Mrs. E. R. Eaton, to be executed and returned, did include it, excepting only the easement of the Ry. company. The deed tendered to Mr. Holgate did not include it, but purported to convey only that part of the tract named in the contract south of the T. W. & W. Ry.

ASSIGNMENT OF ERRORS.

Counsel claims that the decree of the Circuit Court was erroneous in the following respects:—

I. In overruling the demurrer of the appellants to the bill.

II. In dismissing appellant's cross-bill, as after the exceptions to the answer filed to the cross-bill had been sustained, material averments in it stood admitted, and the appellants were entitled to the relief therein prayed for.

III. The bill of revivor and the answer of the new defendants thereto, to which there was no replication, disclosed the fact that the complainant and the four answering defendants to the bill of revivor as legatees of William A. Allen, deceased,

took the property in question, the subject-matter of the litigation, and that Rufus I. Eaton, *as administrator*, had no interest therein. *The law, therefore, required that his bill should have been dismissed.*

IV. The decree was contrary to the law of the case.

V. The equities of the case upon all the evidence were clearly in favor of the appellants.

ARGUMENT.

I. JURISDICTION.—At the October term, 1882, of this court, the appellee by his solicitors moved this court to dismiss the appeal, on the ground that this court had not jurisdiction of the suit. Briefs were filed by both parties and the court passed the motion for argument at final hearing. Counsel for the appellants refer the court to their brief on this motion then filed, and to the authorities therein cited, and add only the following:

Under Sec. 632, R. S. 1881 of Indiana, the Supreme Court has no jurisdiction on appeal of causes begun before a justice of the peace, when the amount of the controversy, exclusive of interest and cost, does not exceed $50. *Held*, by the Supreme Court of Indiana, in *Bowlus* v. *Brier*, 87 Ind 391, that in a case begun before a justice of the

peace, wherein the plaintiff recovered $40 and the defendant had pleaded a counter claim of $50, that the amount in controversy was $90.

It is the sum *actually in dispute between the parties* that gives jurisdiction.

Hilton v. *Dickinson*, 108 U. S. 165.

This sum includes counter claims.

Bradstreet Company v. *Higgins*, 112 U. S. 227, 229.

II. The demurrer of the appellants to the bill of complaint should have been sustained by the Circuit Court instead of overruled. There is no privity of contract existing between the complainant and the parties to the contract she seeks to enforce; nor does the bill show any cause of action in the complainant as the *cestui que trust* of John B. Eaton; nor reason why the suit is not brought by the trustee. The amendment to the bill making him a party does not cure this, nor does the bill show that the conditions of the contract were complied with, by sending on to the appellants "the notes and mort-"gage on which the judgment was taken by which "his (Eaton's) title was acquired," or any cause why the same was not done. It does not appear from the bill that the notes and mortgage sued on were executed to the complainant "*on demand of* "*said Eaton*," or even with his consent; nor is there any consideration shown for the execution of the

notes and mortgage to *her*. It also appears in the original bill that *two years had elapsed* after the date of the mortgage, before the alleged tender of the deed, *signed by the complainant* according to the terms of the contract.

Story's Equity Pleadings, §§ 201 and 209.
Jones on Mortgages, 3d Ed. Vol. II, § 1384.

III. At the time of the hearing by the Circuit Court, the exceptions to the answer of the appellant's cross-bill having been sustained, material allegations therein contained stood undenied and the appellant's were entitled to a decree for the relief prayed for, *provided* they showed in their cross-bill equitable cause for such relief. It is apparent from an inspection of this cross-bill (Record, pp. 12 to 17) that they have done this. After averring in the cross-bill the loan of the $400.00 by the appellant Holgate to John B. Eaton, under the belief that Eaton had sufficient rights in the premises to secure the means to care for the same, and the taking of the deed from Eaton as security for the loan with an agreement that this was to be substituted for a deed in which Eaton and his wife, the complainant in the original bill, should join, and the appellants aver the belief:—

"That said Eaton was ready and willing to faithfully perform his portion of said contract, and to execute a new deed in pursuance to its terms; but they aver that he was prevented from so doing by

the refusal of his said wife, the complainant in said original bill, to join with him in its execution" (Record, pages 13 and 14). And they "further aver that on the said 8th day of June, 1875, being still desirous for the fulfillment of said contract with the said John B. Eaton, and disposed to waive his laches in the premises, and thinking it would be satisfactory to him for them to do so, and so enable him to fulfill (the conditions of said contract) on his part, executed two notes of $1,500 each, of the date of October 1, 1874, making the same payable to the said Elizabeth R. Eaton at the Defiance National Bank, with interest payable annually; also a mortgage on said land, as described in said original bill of complaint, to secure the same. That on said 8th day of June, 1875, they inclosed said notes in an envelope, together with a deed filled out ready for the signatures of the said John B. Eaton and the said Elizabeth R. Eaton, and directed and properly paid the postage and mailed the same to the said Elizabeth R. Eaton, Fryeburg, Maine, upon condition that the deed so inclosed should be executed by the said John B. Eaton and the said Elizabeth R. Eaton and returned to your orators, and that no right of property should vest in said Elizabeth R. Eaton in said notes and mortgage, except on the execution and return of said deed within a reasonable time thereafter." The appellants further aver in their bill "that on the 13th day of July, 1875, the said Elizabeth R. Eaton acknowledged by letter the receipt of said deed, notes, etc., mailed to her on said 8th day of June, stated and said, in reference to said contract made by said John B. Eaton with said orator Holgate, that it was decidedly against her will and wishes; that she was no party to it; felt under no obligations to signing the deed, and declined doing so."

After averring that the deeds inclosed with the notes and mortgage were not executed and returned and that the complainant, Elizabeth R. Eaton, had no right to retain the same, the complainants aver

in their cross-bill that they paid to one Adam Wilhelm, $424.24, to discharge the said premises from a tax lien held thereon by said Wilhelm, and aver an offer to release to the complainant their rights acquired in the lands under their contract with John B. Eaton, and subsequent claims thereon, *upon the condition that all their moneys expended for those purposes be refunded to them.* Then they deny the delivery of the notes and mortgage sued on in the following words:

"Your orators further say that the said two $1,500 notes in said original bill set out, and the said mortgage executed by your orators to secure the same in said bill described, were never delivered to said Elizabeth R. Eaton by your orators, and they aver said Elizabeth R. Eaton has no right to maintain a suit upon the same; and that your orators have a right to the possession and control of the same."

They then aver (Record, page 16), that the said John B. Eaton had withdrawn his consent to the payment of the amount of said notes to the complainant, Elizabeth R. Eaton, and had notified the appellants "that he should require the balance of "the proceeds of said lands to be paid to him," and their willingness to release any right in the said premises upon repayment to them of their moneys expended as aforesaid, and their request made by them to the said John B. Eaton, and to the complainant in the original bill, Elizabeth R. Eaton, of repayment of the same, and they pray for a decree for the amount due them therefor, and that the complainant and her representatives be enjoined

from prosecuting further the original bill against the appellants, and that the notes and mortgage therein sued on may be given up and canceled or the collection of them forever enjoined.

This cross-bill is sworn to by both of the appellants (Record, page 17), and standing now upon this alone, undenied as it is of record, or in fact, in many of its material averments, it must be apparent to the court that the equities of the case were with the appellants, and that they were entitled *pro confesso* for the relief prayed for, dismissing the original bill and the repayment to them of their moneys laid out as stated. In support of this claim, counsel will refer to the authorities hereafter cited upon the issues of fact, which, he claims, were proved on trial.

Equity rule 64:

IV. The decree should have been for the defendants below, the present appellants, for that it appears as well from the so-called bill of revivor and answer thereto of the new defendants as well as from the proof, that after the death of the original complainant, Elizabeth R. Eaton, in the suit, *the action did not revive in favor of her administrator, Rufus I. Eaton*, and that as such administrator he took no interest whatever in the subject-matter of the suit, and could not further prosecute the same; hence that *no decree whatever could have been made in favor*

of Rufus I. Eaton as said administrator, and against these defendants, but the decree upon the issues as made after the suit was revived by them, upon the law as appears from the issues and the facts as proved, should have been for the appellants.

It appears from the supplemental bill and the answer of the defendants thereto, that John B. Eaton, Alonzo L. Eaton, C. Lewis Eaton, Horace A. Eaton, and Rufus I. Eaton, the administrator, sons of the deceased complainant, Elizabeth R. Eaton, as legatees of one William A. Allen, deceased, took the property directly under said will, subject only to a life estate of their mother, Elizabeth R. Eaton, the deceased complainant, and hence the suit, if revived at all, should have been revived directly in the names of the said legatees as the parties next having interest in the subject-matter of said suit. (Record pp. 26 to 28) and as there was no issue taken upon this answer by replication, it worked a dismissal of the action, and the defendants were entitled to a decree on their cross-bill.

So upon the proof it is clearly established that as Rufus I. Eaton *as administrator* of the deceased complainant, took no interest whatever in this property, the suit could not be prosecuted by her personal representative, as at her death her interest in the subject-matter of the suit ceased (See Exhibit 54, Record, page 124, and the assignment of the Bartley Campbell mortgage in Exhibit 53, Record, pp. 120 and 121).

Story, in his Equity Pleading, Sec. 379, makes a clear distinction between bills of revivor and bills *in the nature* of bills of revivor. The former "is "founded upon mere privity of blood or representa- "tion by operation of law, the latter upon privity of "estate or title by the act of the party."

"In the latter, the nature and operation of the whole act by which the privity of estate or title is created, is open to controversy. Thus, for example, the heir may be made a party by bill of revivor, for his title is by mere operation of law. But *the devisee must come in* by a bill in the nature of a bill of revivor, for he comes in as a purchaser under the testator, in privity of estate or title *which may be disputed.*" And he refers to *Slack* v. *Wolcott*, 3 Mason, 508 (opinion by Judge Story), where this subject is discussed at large.

In this case the parties in interest took, as legatees, at the death of the complainant, Elizabeth R. Eaton, and under the rule laid down by Judge Story, above, the suit could not be revived in the name of her administrator by a bill of revivor.

V. Upon all the issues of fact in the case the evidence clearly preponderated in favor of the appellants, and the law and equities of the case were with them, entitling them to a decree, and as we have argued, it does not either appear from the bill of complaint, or from any issue taken to the cross-bill of the defendants, that the complainant complied with the terms of the contract of sale.

1st. Neither John B. Eaton nor Elizabeth R. Eaton nor any one for them, ever sent to the appellant Newbegin "the mortgage and notes on which the "judgment was taken by which his said title was "acquired" in case he could find the same, for the purpose of filing them among the papers in the Van Pelt suit, although upon the hearing it appeared that these notes and mortgage were, during all the time, under the control of Rufus I. Eaton, the representative of the complainant, Elizabeth R. Eaton. (See contract, Record, page 87, and testimony of Rufus I. Eaton, pp. 83 and 84.)

2nd. The notes and mortgage were never executed and delivered to the complainant. They were sent to her as an inducement for her to enable her trustee, John B. Eaton, to comply with his contract to the appellants by executing on her part with him the deed provided for in the contract by the parties thereto. A draft of this deed was included with the notes and mortgage forwarded to the complainant with the letter of appellant Holgate, wherein it was stated that the notes and mortgage were to be retained and *accepted by* the complainant, Elizabeth R. Eaton, *upon the express condition of the execution and return of the deed to the appellants.* This was never done; on the contrary, all the testimony of both appellants Newbegin and Holgate, together with the letters of Elizabeth R. Eaton, the complainant herself, and of John B. Eaton, her trustee, show that she wholly refused to comply with this

condition, or to make any pretense of complying with it, although being urged all the time by the appellants so to do, until the property named in the contract had so depreciated as to render it nearly valueless to anybody, and then a deed signed by Eaton and his wife, the complainant, was forwarded by Rufus I. Eaton, the present complainant in the bill, who appears from the testimony to have been acting for and controlling the movements of his mother throughout the whole controversy. This deed the appellants claim to have tendered to the defendants as a compliance with the contract of Eaton to execute and return another deed conveying the property described, in which his wife should join as a grantor, but it did not convey the 13-acre tract north of the T. W. & W. R. R., the easement of which for railroad purposes had then been acquired by the B. P. & C. Ry. Co.

See Testimony of Newbegin, Record pp. 48 to 52 inclusive.

Letter of Newbegin to John B. Eaton, exhibit 2, page 91.

Letter of Holgate to Mrs. E. R. Eaton, exhibit 1, Record page 92.

Letter of John B. Eaton to Newbegin, exhibit 29, Record page 92.

Letter of Newbegin to Mrs. E. R. Eaton, exhibit 4, Record page 93 & 94.

Letter of Mrs. E. R. Eaton to Holgate, exhibit 40, Record page 95.

Letter of Newbegin to Rufus I. Eaton, exhibit 6, Record page 97.

Answer to same, exhibit 7, Record page 98.

Testimony of W. C. Holgate, pp. 65 to 67.

Letters between Mrs. E. R. Eaton and Newbegin, exhibits 25 and 26, page 108.

Letter of John B. Eaton to Newbegin, withdrawing consent to pay balance of the purchase price of the land to Mrs. E. R. Eaton, exhibit 27, page 110.

Now it is conclusive from the testimony that conceding to the complainant, Elizabeth R. Eaton, the right to sue upon the contract to recover the balance of the purchase money, she did not, on her part, in any respect comply with the conditions of the contract; on the contrary her son, Rufus I. Eaton, acting for her, held the Campbell notes and mortgage with evident intent to keep them from the possession of his father, John B. Eaton, and thereby prevent him from complying with his contract by delivering them up to be filed with the papers in the Van Pelt suit, and the complainant, having received the notes and mortgage sent her by the appellants into her possession, wrongfully retained them for two whole years, all the time refusing to join in the execution of the deed, until the property had so depreciated as to make it more profitable for her to take the money than to retain the property. Then she signed a deed with the 13 acres, subject to the easement of the railroad com-

pany, *omitted* from the description, which was forwarded to the appellants by Rufus f. Eaton, her son, acting for her, and claiming it to be a tender of the deed in compliance with the contract, and almost concurrently with the bringing of this suit to foreclose it, is filed for record at Defiance the mortgage deed sued on.

(For description of deed sent to be executed with the notes and mortgage, see exhibit 45, Record page 115; for the one executed and tendered, see Record pp. 121 and 122, from which the 13-acre tract is especially excepted in the following words: "Also ex-" cept that part of said half section lying northwest "of said railway.")

The mortgage and notes were forwarded to the complainant by the appellants upon the express condition that she should, on her part, execute the deed accompanying them, which she failed to do; hence they were never delivered.

Chandler et al. v. *Temple*, 4 Cush. 285.

Goodwin v. *Owen*, 55 Ind. 4th prop. syl.

Tisher v. *Beckwith*, 30 Wis. 55. (8. C. 11 Am. Rep. 546.)

The mortgage was not delivered unless the condition accompanying it was accepted by the complainant.

Adams v. *Johnson*, 41 Miss. 258.

Faunce v. *State etc., Assurance Company*, 101 Mass. 279.

Walkins v. *Bowers*, 119 Mass. 383.

See also

Sweet v. *Stevens*, 7 R. I. 375.

And especially

Pym v. *James*, 6 Ellis & Bl. 370.

Bell v. *Ingestre*, 12 Ad. & El. (N. S.) 316.

3d. This suit is in its nature one for specific performance of the contract made between the appellants and the trustee, John B. Eaton. Now specific performance will not be decreed to a purchaser after he has permitted a long time to elapse without evincing a fixed intent to carry the contract into execution on his part, especially after the circumstances of the parties have changed. "A "party can not call upon a court of equity for a "specific performance unless he has shown himself "ready, desirous, prompt and eager to perform the "contract on his part."

Milward v. *Thanet*, 5 Ves. 720, *note*, adopted by Judge Story; Vol. 2 Story's Equity, Sec. 776. (See the whole section.)

Nor will equity enforce a contract where the remedies are not mutual, and where the party seeking to enforce it can not, from the nature of the contract, be compelled to perform it specifically on his part; nor can the party seeking to enforce it lie by until he sees whether he is going to make a losing or profitable bargain, and in the one case seek to enforce it, and in the other abandon it. But under these circumstances the contract on the prayer of

the party not in default will be rescinded. Judge Shepley says, in *Rogers* v. *Sanders*, 16 Me. 92, "Where the party who is not bound lies by to see "whether it will be a gainful or losing bargain, to "abandon it in the one event, and in the other to "consider the lapse of time as nothing, and claims "a specific performance," it will not be enforced.

In *Cooper* v. *Pena*, 21 Cal. 403, it is held that equity will not enforce a contract where the party asking its enforcement from the nature of the contract can not be compelled to perform it specifically on his part.

In *Miller* v. *Henlan*, 51 Pa. St. 265, it is held that specific performance will not be decreed to a purchaser after he has permitted a long time to elapse without evincing a fixed intent to carry the contract into execution, especially after the circumstances of the parties have changed.

To the same effect are the holdings in *Andrews* v. *Bell*, 56 Pa. St. 343, and *Pigg* v. *Corder*, 12 Leigh, 69.

In *Alley* v. *Deschamps*, 13 Ves. 228, Lord Chancellor Erskine says, "it would be very dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain; and according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance." See also, especially, on this point, opinion of Judge Thurman, in *Kirby* v. *Harrison*, 2, O. St. 326.

There is nothing in the testimony showing acquiescence of the appellants in the unreasonable delay of the complainant in attempting to enforce her contract, but everything proves the intention on her part not to abide by it, until long after the circumstances of the parties had so changed that it evidently would be for her advantage to have it enforced. The holding of the mortgage from the county records until the commencement of the suit is the most conclusive evidence of this.

See generally on the foregoing, the following authorities:

Richmond v. *Gray*, 3 Allen, 25.
Goldsmith v. *Guild*, 10 Allen, 239.
White & Tudor's Leading Cases in Equity, Vol. 11, p. 121; pp. 1119 to 1139 of 4th Am. Edition.
Cooper v. *Brown*, 2 McLean, 495.
3 Humph. 644.
Anderson v. *Fry*, 18 Ill. 94.
Gentry v. *Rodgers*, 44 Ala. 443.
Hepburn v. *Auld*, 5 Cranch, 262.
Brashear v. *Gratz*, 6 Wheat. 528.
Taylor v. *Longworth*, 14 Peters, 173.
Holt v. *Rogers*, 8 Peters, 420.
Pratt v. *Law*, 9 Cranch, 456.
Sullings v. *Sullings*, 9 Allen, 234.

As an excuse for not delivering the deed conveying the whole land described in the contract, the complainant's counsel claim in argument that both

parties were divested of all interest in the thirteen acre tract by its appropriation by the railroad company. Whether this be true or not the appellants had a right to a technical compliance with the contract on the part of the complainant. But the railroad company took an easement only in the thirteen acres appropriated for railroad purposes, leaving the fee in the trustee, John B. Eaton, and on failure of the railroad company to use the easement for the purposes for which it was condemned, it would revert to the original owner or his assigns. The Supreme Court of Ohio in the late case of *Platt and Scribner* v. *The Penna. Company*, to be reported in 43rd Ohio State, held, as appears from the syllabus prepared by the court, that "where a railroad company has appropriated land for railroad purposes, "an easement and not a fee passed," and that where "the company appropriated more land than was "necessary for its use," it was not authorized "to "sell in perpetuity such surplus part to another "railroad company," and that the original owner "is not estopped by the condemnation proceedings "to show that the first company appropriated more "land than was necessary for its use."

See this case in No. 1, Vol. 1, Western Reporter, p. 11, and see also

Hollingsworth v. *Des Moines & St. Louis Ry. Co.* (Supreme Court of Iowa), XVII. Amer. and Eng. R. R. Cases, 113.

Proprs. Locks, etc., v. Nashua, etc., R. R. Co., 104 Mass. 1;

Strong et al. v. *City of Brooklyn*, 68 N. Y. 1;
Giesy v. *C. W. & Z. R. R.*, 4 Ohio St. 325.
Harris v. *Elliit*, 10 Peters, 25.
Phillips v. *Dunkirk R. R. Co.*, 78 Pa. 177.
Pitts. & L. E. R. R. Co. v. *Bruce*, 102 Pa. St. 23 (S. C., 10 Am. & Eng. R. R. cases 1).
Kellogg v. *Malin*, 50 Mo. 496.
A. & F. R. R. Co. v. *Burkett*, 42 Ala. 83.
Henry v. *Dubuque & Pac. R. R. Co.*, 2 Iowa, 288.
Blake v. *Rich*, 34 N. H. 282.
Oregon Ry. etc., Co. v. *Or. Real Estate Co.*, 10 Or. 444.

Nor on discontinuance of the use and reversion can the railroad company recover back the money paid.

Westbrook v. *North*, 2 Me. 179.
Nicholson v. *Stockett*, Walk. (Miss.) 67.

But it is argued by the appellant's counsel that the decree of the Circuit Court, ordering the parties in interest to convey all the land as described in the contract is in legal effect a compliance with its terms. It was not in the power of the court by this decree to repay the appellants for the loss they had suffered by the depreciation of the property on account of the long delay and refusal of the complainant to comply with its conditions; nor to restore them to their original condition in respect thereto. "*modus et conventio vincunt legem.*" "A chancellor "will not make a contract for the parties by com- "pelling the vendor to do what he did not agree to, "because he can not do as he agreed." White and

Tudor's Leading Cases in Equity, part 2d, Vol. 11, p. 1149; for a much stronger reason should not the appellants be compelled at her suit to do what they did not agree to, because the complainant *would not do as she*, through her trustee, *had agreed*.

Wherefore it is respectfully submitted that this suit should be remanded, and the Circuit Court instructed to render a decree dismissing the complainant's bill, and granting the relief prayed for by the appellants in their cross-bill.

HENRY NEWBEGIN.

In propria persona.

116 33

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Supreme Court of the United States

OCTOBER TERM. 1885.

NO. 75.

WILLIAM C. HOLGATE and HENRY NEWBEGIN,
Appellants,

AGAINST

RUFUS I. EATON, Administrator of Elizabeth R. Eaton, Deceased,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT OF APPELLANTS.

WILLIAM C. HOLGATE,
APPELLANT.

DEFIANCE, OHIO:
WHITE & MAINS, PRINTERS.
1885.

IN THE

Supreme Court of the United States

OCTOBER TERM. 1885.

NO. 75.

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Appellants,

AGAINST

RUFUS I. EATON, Administrator of Elizabeth R. Eaton, Deceased,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

APPELLANTS' BRIEF.

This suit of the Appellee upon a mortgage on premises in the bill described, given by Appellants as claimed to secure two notes of $1,500 each, dated October 1st, 1874, also brings into controversy in this cause a deed (mortgage) of the same premises executed by John B. Eaton (now the Appellee) to William C. Holgate (now the Appellants) dated July 30th 1874, (see record p. 111.) Also a written memorandum of an agreement of same date (see Record p. 87.) between the same parties showing the

conditions and terms of the sale of said land deeded, by which the Appellee it is claimed, contracted to sell the premises to Appellants, in installments from and after October 1st 1874, for the sum of.....$6,000 00

And a taxtittle as paid by Appellants June 15th, 1875, for sum of..... 424 24

Tolal original purchase money. $6,424 24

From which deduct amount settled by way of a R. R. condemnation suit. $2,600 00

Leaves a balance of.....$3,824 24

It is this balance of purchase money as claimed with interest on.....$3,400 00

of it, from Oct., 1st, 1874, to January 3d, 1882 (the time of taking said decree) 7 yrs., 5 mos.. and 4 days..... ... 1,500 26

And interest on the balance (the tax title of)... 424 24

from June 15th 1875, to January 3d, 1882, 6 yrs., 6 mos., and 19 days..... 166 72

Making a total in controversy Jan. 3d, 1882 at the time this appeal was taken. of.....$5,491 22

$4,310 00 of said sum was claimed by the Appellee under said agreement and deed, as a balance of said purchase money. The justice of Appellee's claim was denied by Appellants, who set up a claim for $1,181 22 of said sum, as monies advanced on the security of said agreement and deed, mainly to save said premises for said Appellee, *incidentally* to be applied as part of the purchase money of the same, on the performance of certain terms, and conditions agreed to be performed by said Appellee, which he wholly failed, refused, and neglected to comply with till after the

elapse of two years, when the property had depreciated more than 100 per cent. in value, and Appellants could no longer make it available, and so declined to close the proposed purchase.

The application of these advancements as purchase money, was not contemplated 'till after the elapse of sixty days, and then they were not made, as will be seen, or required to be, except Holgate should "be satisfied with the title, * * "quantity of land, "and all other particulars." Holgate (the appellants) could not be required to account for this property as a purchaser, either before. or after this 60 days, except *he was satisfied* with the title, and with *every thing else relating to it.* His letter of Sept. 30th, 1874 does not modify his right in this particular, but both that, and the original memorandum itself, and every act, and letter of his afterwards, show a want of satisfaction on his part, first on account of title, second on account of quantity of land, and third on account the two years laches by Appellee, rendering the purchase valueless. If time will not run against Appellee's right to deed, why should it against Appellants right to satisfaction?

As we understand this Eaton deed, with the memorandum of agreement executed at the same time, between the same parties about this land, will be construed together, as one and the same instrument. Though seemingly, making an absolute sale on their face, they were really made to secure the proper adjustment of advancements to J. B. Eaton (the Appellee) to save his property, and so were a mortgage.

"If *a contract for the conveyance of land* be intended as a se-"curity for a debt *it is a mortgage* whatever may be its form or the "name given it by the parties."—Cotterel vs Long 20 O. 464.

"Intention of parties * * govern in equity and any agreement "in the deed, or in a separate instrument, showing that the "parties intended that the conveyance should operate as *a*

"*security for the repayment* of money, will make it a mortgage." (Bremer vs. Connecticut 9. O. p. 195.)

"It is now the acknowledged doctrine that *parole evidence* is "admissible to show that a deed was a mortgage only, notwith- "standing it appears absolute on its face; * * and a conveyance "once established as a mortgage, 'always remains so," * *.

Miami Export'g. Co. vs. Bank U. S., Wright 249.

"Whether a conveyance be a mortgage or a conditional sale "depends upon the particular circumstances of each case * * "The only safe criterion is the intention of the parties, to be "ascertained by considering their situation, and the surrounding "facts, as well as the written memorials, of the transaction, * * *in "all doubtful cases* they are construed to be mortgages, rather "than conditional sales." Martindale on conveyance p. 366. Sec. 417.

"The test is the existence, or nonexistence of a debt. Same 'page, note.

"A court of equity will often pronounce that to be an equitable "mortgage, which at law, would be considered as a conditional "sale." Same p. 367 note.

"The intent that the transfer shall operate as a security, must "enter into the original contract." Same p. 368.

"Where a deed, and a written contract were simultaneously "executed * * held that if there was a continuing obligation for "the debt, the transaction was a mortgage, although the deeds "expressly stated that the debt was fully satisfied, and the contract "was intended as a conditional sale, and not as a mortgage." Same p. note.

It was some four months before this deed, and memorandum was executed, that Holgate had loaned John B. Eaton about $200, of the $400, referred to in the agreement, as being advanced to him. This $200, had saved the premises from sacrifice at Sheriff's sale, and the balance was used in paying his expenses in

coming from Maine to Defiance, to take care of this property, and in getting home again. See test. R. p. 63.

This $400, needed security, and John B. Eaton having title to these premises, which then embraced the R. R. interest, worth perhaps $5,000, had rights enough in the opinion of Holgate, to secure the small advancements needed to save, and protect the property; (vid. Holgate's tes't. R. p. 69.) but not enough as appears from the memorandum (see Record p. 87.) to justify a purchase. In this memorandum John B. Eaton is required to execute another deed, to be joined in by his wife, *as grantor*, and to send on the mortgage and notes, to be field in the case in which the judgment was obtained, by which said John B. Eaton acquired his title (vid. p. 87 R. also exh. 53 p. 118 to 121 R.) Matters were left here for two months *in statu quo*, for Eaton to perfect his title, and Holgate to become satisfied with it, and the purchase. No interest begins to run, or purchase money matures, and Holgate has the option, in effect, for these two months, to hold the land, or not, as a purchaser, on the terms of the agreement, though nothing was due or might ever become so, this $400, is referred to as advanced by Holgate on the $1,000, installment to come due Oct. 1st 1874.

But this $400 advancement appears to have been by way of a loan obtained at the Defiance National Bank for ninety days by a note executed by said John B. Eaton, with the said Holgate and Newbegin as his sureties, who afterward bought up and had his note assigned to themselves, and which they still hold. (vid. Exq 37, p. 111 R.)

In Holgate's letter of Sept. 30th 1874, to J. B. Eaton, giving

notice of his intention to hold the land "agreeably to the terms "and *spirit* of the contract," Holgate requests payment of this $400 loan, (vid. Exh. 41, p. 90 R.) and so modifies the original terms of the memorandum, as to conform to the changed conditions made by the R. R. condemnation suit, which had in effect liquidated the $1,000 installment on which this $400 was at first intended to be applied.

This $400 advancement then was not adjusted on July 30th 1874, at the time it was made, nor was it adjusted two months later when the $1,000 installment had matured, in fact, it did not itself mature until *one month later*; and here it is before us unliquidated, and unadjusted to-day, (vid. exh. 37. p. 111. R.)

But the memorandum in writing accompanying the Eaton deed of July 30th, 1874, has this full and complete sentence: (It is not *a part of a sentence* as wrongfully copied in Apellee's original bill.)

"And for any advancements to said Eaton by said Holgate that "is, or may be made, said Holgate shall have a lien on said premises, "and may hold the title to the same as a security, 'till such advance "ments shall be adjusted." (vid. Record p. 87 and 88.)

Here is the provision for holding this title granted by this deed and land agreement as *a security, with all that, that implies*. Here is the defeasance that makes in the very inception of this matter, a mortgage, of this deed, and land agreement, absolute on their face: as "a contract for the conveyance "of land, intended as a security for a debt, is a mortgage "whatever may be its form, or the name given it by the parties," 20, O. 464 above quoted.

And note the words in the sentence, I here quote from this agreement, "*any advancements that is*, or may be made * * shall

"have a lien and hold * * as a security 'till such *advancements* "*shall be adjusted.*" This specifically covers this $400, advancement, that the same contract shows was *then made*, and also shows by its whole tenor was not intended *to be adjusted* 'till the elapse of the 60 days, or such further time as Appellants would be pleased to give Eaton, to perfect a satisfactory title. The co-temporaneous letter of Holgate dated Sept. 30th, 1874 (Record p. 90.) also the note itself given for this advancement dated July 30th 1874, (Record p. 111) referred to above confirm this view of the intention of the parties in this matter If the title is held by *this deed as a security* then, so soon as that security debt is adjusted, the title fails, and the deed becomes null and void. "Once a mortgage always a mortgage." If then this Eaton deed of July 30th, 1874, is a mortgage to become null and void, as soon as the advancements secured by it are adjusted, was it not most vital to the interests of these appellants, that they have a deed to this property in case of consummating a purchase, that would not thus become void.

This letter of Sept. 30th 1874, of Holgate's indicates as plainly as the original contract did, that Holgate was not satisfied with the title as then held by him, and more. For after requiring Eaton to send on the new deed, and the Weisenburger mortgage and notes, Holgate says, "We understand there will be * litigation, and will "expect you to remove all reasonable doubts or clouds on the title, "* " The time had elapsed for performance, on the part of Eaton. He had not put himself in position to claim as a vendor, when the 60 days was up; and Holgate's letter while waiving none of his own rights, in effect offers a new deal about the matter. The R. R, condemnation suit had come off during those 60 days and some more light, it is evident from the letter had come to Holgate about Eaton's title, and he explicitly tells him how he will *then trade*

Holgate finds Eaton willing to perform, and bears and suffers with him in his struggles, to induce performance onthe part of Elizabeth R. Eaton his wife, now deceased, and her five full grown sons averaging 30 to 40 years of age, who are now here as Appellees claiming to be the *cestui que trusts* of this John B. Eaton and as such have the right to the fulfilment of this contract as its Vendors. Where were these sons, and what were they doing, when their aged father *and trustee*, as they claim, crippled with rheumatism, and without money to pay his expenses, was hobbling to and fro, between Maine and Ohio, to save their property. The correspondence and testimony shows, that through this R. I. Eaton, the next friend of Elizabeth R. Eaton, who filed the original bill in this case, and who was acting as her, and their agent, they were striving to paralize the efforts of their father and trustee, in his manly exertions, in the performance of the agreement, they now seek to enforce.

The Weisenburger notes and mortgage under which John B. Eaton's title was derived, and which were to be sent on if they could be found, we find in the possession of the oldest son at Indianapolis in 1872-73, and by him they are sent to this R. I. Eaton, then at Cincinnati, who keeps them out of sight for more than eight years. (See R. I. Eaton's test. Record ps. 82, 83, 84.) When they are wanted to quell the rumors, that the judgment on them, taken by John B. Eaton, was fraudulent, he keeps them hid away. He is holding them July 30th, 1874 when this agreement was made; and Sept. 30th, 1874, when it matured, and they were needed to be sent on, and filed, in its fulfilment. And when in 1877, he files the original bill, in this case, and says that his trustee, had "fully and faith "fully performed his portion of said agreement," he still had these

notes and the mortgage, covered from sight, in his own possession, and he keeps them there yet four years, 'till constrained to disgorge, before the referee.

It was June 8th, 1875, over eight months after maturity of said agreement that Appellants at instance of John B. Eaton sent on to Elizabeth R. Eaton, the notes and mortgage here sued upon, to be received by her, only on condition of her execution, as grantor, with her husband, and return of the Warranty deed, which was enclosed with same, for the conveyance of the property to said Appellants, as was agreed, and as Appellants required. (vid. Exh. 1 Record p. 92). John B. Eaton was notified of the sending, and told in effect, that the deed was wanted back at once. (Exh. 2. R. p. 91.) In response to this under date of June 22d, 1875, John B. Eaton writes that he had no doubt the deed, mortgage, notes, &c., had been received, but not "one word had been intimated to him "about them," and in same letter towards the close, he says: "You (Appellants) * had complied with the undertaking with "him, and it only remained for him to do his part * * that we "knew the cause of the delay &c." (Exh. 29 p. 92)

On the 6th day of July 1875, Mrs. E. R. Eaton, making no acknowledgment as yet of the receipt of the deed, notes, &c., was again written to about them, and told that, "we fully expected to "have received the deed back before that time &c.." (Vid Exh. 4 p. 93 Record.) On July 13th, 1875, she writes to Holgate that "the "deed, notes, &c., accompanied by your letter are received, * * "that she wished to state respecting the contract between Mr. "Newbegin, yourself, and Mr. Eaton, that it was made wholly "without my knowledge, or sanction, and that it is decidedly con-

"trary to my will and wishes in the matter. Mr. Eaton was not "authorized by me to sell my property in Defiance, consequently I "feel in no sense bound by the contract Therefore, considering "myself in no wise a party to the contract I feel under no obliga- "tion to sign the deed." (vid. Exh. 40 p. 95 Record.) In October 1875, this R. I Eaton, next friend, and agent of Elizabeth R. Eaton, and of these Appellees, who having his grasp upon these notes and mortgage of Appellants, appears in Defiance, and when appealed to for their return, or that of the deed, he refuses both. (Test. Newbegin Record ps. 50-51.)

He holds on to the title, he holds on to the money paid by Appellants to save it, on to the Weisenburger notes and mortgage, and on to these notes and mortgage. Appellants had been careful that these notes should not be negotiable, and so were not uneasy about their fraudulent transfer. The R. R. shops had been lost at this time and the property had begun to decline, creating much indifference with Appellants, as to whether they got the title, or their notes and money back.

Towards the spring of 1876, Holgate was called on by parties desirous of locating an extensive factory on these premises, and for the want of such title as would justify him in contracting with them about it, it was located on the opposite side of the town. (vid. Holgate Test Record p. 66.) While Holgate's warranty might insure to the parties the return of any money they paid him, in case of loss of title, it would not insure to them the return of the $50,000, they wanted to invest in buildings, to be erected on the premises.

It was about June 1876, after the loss of this Turnbull and Shelly factory to the Westerly side of the town, where those

premises were located, and its location two miles easterly, drawing with it the main growth of the village, and so causing this property to become depreciated more than 100 per cent. in its value, that these Appellants determined they would no longer wrestle with these Appellees, for title to this property. One year and eight months had elapsed since Appellees were in default, and since these Appellants kindly waiving their laches, had been in vain begging, and preaching, and coaxing, and scolding, and almost praying them to fulfill their agreement, and they determined to do so, no longer.

On June 13th, 1876, Holgate writes Mrs. Eaton to the effect if Mr. J. B. Eaton would join in the recision of the contract, and Appellants could have the money advanced on it returned within 30 days with interest, he thought he would close matters in that way. It had been considered whether Appellants should not have damages in addition to the return of the money with interest, but Mr Holgate thought they would only require interest. (vid Exh 42. Record p. 101.)

On July 12th, 1876, Newbegin writes to R. I. Eaton, telling him in effect, he had arranged with Holgate, to write in substance to his mother, "that if your father will release us from any claim "on his part to the balance of the purchase money * * we would "quit claim to your mother our interest in the land, on payment "back to us, of what we actually paid out * * &c.; and (con-"tinues Newbegin) we have received nothing from her in response." And nothing ever came from Mrs. E. R. Eaton in response; but R. I. Eaton writes as if he had not seen, and been informed of the terms of Appellants proposition, when Holgate again explicitly repeats it to him, in a letter dated Oct. 2d. 1876; and again in a

letter dated Nov. 13th, 1876. In this last letter in addition to repeating his terms of having his money back with interest, Holgate says: If the deed had been sent on as agreed he could have made the investment in the land very profitable, that "there "was good demand then for the property in that direction, and even "a year or over later, had it come, I think I could have secured a "large factory there, but for the want of a satisfactory title, parties "desirous of locating, it went in an adverse direction, and are "now drawing the business, and growth of the town, there with them. "Under the circumstances (continues Holgate) although I consider "myself damaged by this non-fulfilment of the contract, all I will "ask is simply to have my advancements in relation to said land. "reimbursed with proper interest &c." (vid. Exh. 13, 43. R. ps. 101, 105.)

It was not the fault of Appellants that this large factory employing 300 men, and that had the effect to build up a village two miles east, of 1,000 people in less than two years, was lost to this property; but it was the fault of these Appellees. And what do they do when they find their property has declined from about $4,000 to $1,500 in value, (see Newbegin's Test. Record ps. 51, 60, 61 and Holgate's 66, 67,) and that Appellants decline now to take it, and want the money paid out on it returned. Why this R. I. Eaton writes under date of Sept. 7th, 1876, that "for divers per- "sonal and private reasons he had prevailed on his mother to sign "the deed which he presumed she would do, &c," (Exh 16 R. p. 103.) He no longer insists on a bonus of $200, as claimed the May previous. (vid. Exh. 5, 14, Record ps. 100, 101, 102). Oh no, when these Appellees find they will be getting near 200 per cent. more than its value out of these Appellants, who saved the entire property for them, they become kind of generous, and say

hey presume the deed *will* be made. Having for more than two years repudiated the agreement causing annoyance, vexation, and thousands of dollars of pecuniary loss to Appellants, they now claim it was binding, only there was no essence of time in it, and so they had a right to this two years repudiation, and to deliver the deed that was due under it Sept. 30th 1874, on Dec, 8th, 1876.

And so it came about that *a deed* came to Appellants from these parties on the 8th day of December 1876. This was not the deed, however, that was mailed by Appellants to Elizabeth R. Eaton, with the notes, June 8th, 1875. (See the two deeds the 1st on ps' 121, 122; the 2d on ps 115, 116, of Record.) They differed in two very radical particulars. The deed claimed to be tendered Dec. 8th, 1876.

1st, Does no contain the reversionary right, which Appellants were entitled to under the agreement, in that part of the land condemned by the R. R. company.

2d, It is not a warranty deed, joined in by the wife as grantor.

John B. Eaton only warrants the title. The whole case shows he was penniless, and that his warranty amounted to nothing. It was the wife's execution of a warranty deed as grantor, that was bargained for. She owned the property, and had something to make such warranty good.

Aside from this insufficiency of Appellees tender under the agreement, we submit whether they had the right to retain those notes and mortgage except they executed the *identical deed*.

enclosed with them, and returned it. Time was called on them repeatedly, about this matter, and they were told to act "*at once.*" (See Exh. 2 and 3 ps. 91, 93, also see ps. 50, 51, Record.)

But time was the essence of this new deal, as it were. John B. Eaton had failed to perform, and make the title satisfactory to Holgate, because these Appellees had rendered him powerless in doing so. Appellants were holding the original deed and memorandum, in pursuance to its terms, as a security (mortgage) for the repayment, or adjustment of the advancements. See cotemporaneous letter of J. B. Eaton of Aug. 15th, 1874, inadvertently omitted above showing that he did not regard the original transaction as a full sale, but as a security for a debt. Speaking of the R R. condemnation suit he says: * "the money less amount due Mr. "Holgate can remain * * until questions concerning it are set- "tled. So if Mr. Holgate purchases it, * * I hope he will be "able to determine soon, as I have an offer &c., * *" (vid, Exh. 28 p. 88, 89.)

Still wishing, however, to complete a purchase, if they could get a satisfactory title, and finding that Elizabeth R. Eaton could make such a title. Appellants forwarded their notes and mortgage to her with the proposal, in effect, that she could keep them in case of her execution and return of the deed found on pages 115, 116 which was never executed, and which, as we have seen, she refused to execute.

"The refusal of the person to whom the proposal is made, "puts an end to it; and it will not be revived by a future tender "of acceptance." (Fry on Specific Performance p. 144.)

"Time may be implied as essential in a contract, from the

"nature of the subject matter, with which the parties are dealing." Fry on Specific Perf. p. 416.

"Time is the essence of the contract, wherever it appears "material to the parties, and therefore where the value of the prop- "erty has greatly diminished, and injustice might be done, equity "will not decree a specific performance." McKay vs. Carrington 1 McLean 50.

"And where land has been purchased to sell, and such a "purpose a lawful one, which may be considered by a Court "of Chancery, time will be deemed of the essence of the contract." McKay vs. Carrington 1, McLean 50.

"When the specific execution of the contract will give the "purchaser the property, greatly deteriorated from the value it bore "when he should have received it, it would be unjust to compel him "to receive it. Chancery will never interpose its powers under such "circumstances to carry the contract into effect * * land is a fair "object of traffic * * " Same p. 59.

The proposal in this case by Appellants, to buy the land in controversy, was for traffic, and speculative purposes. As to this, and its great decline in value, See Newbegin's testimony ps. 48, 56 Record Holgate ps. 66, 67, R.

The great decline in the value of this property as averred in the answer: also that the "Real Estate (in controversy) is an open "common, without fences, and was so June 30th, 1874, and "has continued so ever since, and cannot be made of profit "except same is fenced." And no portion of it, was ever occupied, or used by Appellants. (See Newbegin Test. p. 60 and R. I. Eaton's p. 83, Record.) It is true, that at about the time Holgate wrote his letter, saying he would take the land on conditions of the

new deed being sent on, under the supposition it would soon come, he undertook to lease it to one Warren, who paid $25 on the contract, but Warren never went on to it, or did anything at all in the way of fencing, and the deed not coming on so as to give proper title, the land has been left in an open common entirely unoccupied since.

The original deed and memorandum, being a mortgage only, so far as title is concerned, there remained of them, in effect, only a proposal to sell on certain terms. When Holgate, by his letter of Sept. 30th, 1874, accepted with modifications, perhaps John B. Eaton could have declared the sale off, for the reason there was no absolute acceptance. He makes no reply, everything is in a state of uncertainty, these Appellees claims, and rights seem to have become pretty fully developed, and having failed to complete a full and satisfactory purchase of John B. Eaton, Appellants undertake to buy direct from Elizabeth R. Eaton, who is the real owner of the property. Their letter with deed, notes and mortgage, sent her June 8th, 1875, was substantially a new proposition, to a new party, which was as we have seen declined, and so no contract for the sale of the property, was ever completed, either with John B. Eaton, or these Appellees.

As to the nature of the original instruments between John B. Eaton, and William C. Holgate, it is the intent as developed in them, and as clearly shown by cotemporaneous instruments of these *original parties*, that should govern. (*See J. B. Eaton's letter of Aug. 15, and W. C. Holgate's of Sept. 30th*, 1874, p. 89 90 also the $400 note p. 111 Record.)

Mr. Newbegin got his interest in this matter Sept. 15, 1874. See *Holgate's quit claim deed to him Record p.* 114, 115 *also Test p.*

76.) The very fact that he talks of "quieting title," and exerted himself, as he did, to get the new deed, is confirmatory of the testimony, that he had no such satisfactory, available title, as he was entitled to, and needed. And perhaps the title could have been quieted satisfactorily, by proceedings to foreclose this J. B. Eaton mortgage to Holgate; these Appellees being brought in as party defendants.

There having been no complete contract with Appellees, for the purchase of the property as seen, there was nothing for Appellants "to waive," or "rescind," or give "notice about." They had a right to hold on to their mortgage until it was paid, and rescinded by the act of the Appellees.

"Without an express notice, when the party who applies for a "specific performance, has omitted to execute his part of the con- "tract, by the time appointed for that purpose, without being able to "assign any sufficient justification for his delay; and where there is "nothing in the acts, or conduct of the other party, that amounts to "an acquiescence in that delay, the Court will not compel a specific "performance." Kirby vs. Harrison, 2, O. S. 326.

"A person who demands a specific performance, must show "that he has been in no default, unless he can account for it by "special circumstances; * * And for the same reason when a man "has trifled, or shown backwardness on his part, equity will not "decree a specific performance in his favor, especially if circum- "stances are altered." Hutchinson vs. McNutt, 1. O. 10, 19.

Assuming there was some vitality left in the original memorandum, sufficient even to dignify these Appellees with the title of Vendors, was not their track as such, for the whole three years and over, from Sept. 30th, 1874, the time of its maturity, to Dec. 5th, 1877, the time of the filing their original bill, strewn with a

continuous line of defaults, and worse, refusals, and denials, and when at last they did come and make pretence of a tender, note their "backwardness" in doing it, and how, they "kept back part "of the price."

They have not plead, or in any way shown, any "special "circumstances" for their defaults, or their "backwardness," as to their refusals, and denials of the contract, we submit whether they are not beyond the pale of showings, and accountings.

Even where there is a Vendor, no notice is required as is seen above, where the party seeking "a specific performance, has "omitted to execute his part of the contract," when he has not been "ready, desirous, prompt, and eager to perform" 1 2, O. 10 and see 2, O. S. 326 as above. And yet these Appellants gave notice, that they would accept the situation, as Appellees had made it; that they would receive the money advanced by them, and release their interests (See letters above quoted on ps 101, and 105, Exh. 42, 13, 18, 43 Record.)

Appellants aver in their answer, and cross petition, that they have ever been ready to so release their interest in said premises, since said June 13th, 1876, and are now ready to do so, on said return of said advancements, with interest.

The tenacity of Appellees, in holding on to notes and mortgages (as shown above) led Appellants to think it would not be prudent to send on a release deed to them, before getting their money.

Respectfully Submitted,

WM. C. HOLGATE,
Appellant in person.

116/33

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1885.

No.

WILLIAM C. HOLGATE
AND ANOTHER
vs.
RUFUS I. EATON,
ADMINISTRATOR, &C.
ON APPEAL.

BRIEF FOR APPELLEE.

H. S. SHERMAN,
J. H. HOYT,
Counsel for Appellee.

CLEVELAND, O.:
J. B. SAVAGE, PRINTER, FRANKFORT ST.
1885.

SUPREME COURT OF THE UNITED STATES.

WM. C. HOLGATE ET AL., APPELLANTS.

vs.

RUFUS I. EATON, APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The bill in this case was filed in the Circuit Court of the United States for the Northern District of Ohio by Elizabeth R. Eaton, a married woman, by her next friend Rufus I. Eaton, vs. William C. Holgate and Henry Newbegin, to foreclose a mortgage executed October 1st, 1874, by defendants, on lands in Defiance, O., to secure two notes of same date given by defendants for $1,500 each, and payable to Elizabeth R. Eaton in one and two years from date respectively, said notes being payable at Defiance, O. Said Elizabeth R. Eaton having died October 10th, 1878, the suit was revived by her administrator, and her heirs made parties to the proceeding.

The defendants deny the right to foreclose the mortgage on the ground that the mortgage and notes were made by the defendants and sent to Elizabeth R. Eaton to take effect conditionally upon the performance of certain acts relating to the title of the lands, and particularly upon the execution and delivery to defendants of a deed by her and her husband of the lands in question, claiming that such deed was not so made and delivered, or if so delivered, not in a reasonable time; that the

agreement of purchase was not fulfilled by complainants, and that the mortgage and notes were void obligations.

Defendants also filed a cross-bill claiming a lien against the same property for $400 paid by one of the defendants at date of purchase on the purchase price, and for $424.24 additional, paid to clear a tax title on the premises, which, in the contract for the purchase of the property made with the defendant Holgate, said Holgate agreed to pay as a part of the purchase price. To this cross-bill complainant answered denying all its allegations inconsistent with the allegations of the original bill in the case filed, and denying the lien set up by the defendants, and praying that the prayer of the original bill for the foreclosure of the mortgage and notes might be granted and the cross-bill dismissed. It appears in testimony that by the will of William Allen, brother of Elizabeth R. Eaton, a share of his estate was given to her and her children, who are all parties to this proceeding; that one Bartley Campbell, of Cincinnati, her agent, had possession of this share of the estate, it being personal property, and used it as his own. In accounting for the same with Mrs. Eaton, he assigned a mortgage which he held on lands in Defiance to one John B. Eaton, her husband, in trust for Mrs. Eaton and her children. This mortgage was foreclosed under proceedings at Defiance, in which John B. Eaton appeared to be the only party in interest, and at such sale he became the purchaser of about ninety-five acres of land in Defiance.

July 30th, 1874, John B. Eaton thus holding the legal title to this land sold the land to this defendant, William C. Holgate, for $6,000 and the amount necessary to take up a tax claim held by one Adam Wilhelm. The sale was evidenced by a contract written and signed by the parties, by which it was stipulated that $1,000 was to be paid October 1st, 1874, $2,000 in six months thereafter, and $1,500 in one year, and $1,500 in two years, with interest after October 1st, 1874. Simultaneously with the making of the contract Eaton executed and delivered to Holgate a deed of the land. By the contract it was agreed that Eaton was to execute an additional deed of warranty, his wife joining with him, and to forward the same after his return to Maine, together with the mortgage and notes on which judg-

ment had been taken, and under which the sheriff's sale at Defiance had taken place, "if these papers could be found."

The contract further provided that if, on or before October 1st, 1874, Holgate should prefer not to hold the premises on the terms of the contract, Eaton should "*re-purchase*" the same of him, and release Holgate from his obligation to pay as above, and would repay Holgate the $400 advance on the first installment under the contract becoming due October 1st, 1874, for which repayment Holgate might, in the event of his electing not to abide by the contract, hold title as security.

The contract further provided that if Holgate should be satisfied with his purchase he should execute and deliver notes for the unpaid installments, secured by a mortgage on the property, and as a certain portion of the property was at that time involved in railroad condemnation proceedings in the Defiance court, the contract provided that any amounts realized from the railroads were to be credited on the $6,000 purchase money. Holgate, prior to October 1st, 1874, assigned one-half his interest in the contract to Henry Newbegin, defendant, agreeing to convey an undivided one-half of the lands to him on the condition of his paying one-half the purchase money; and a deed was afterwards made by Holgate to Newbegin in accordance with this agreement. Newbegin was Eaton's attorney at this time, and proceedings being had to condemn for railroad purposes about thirteen acres of the land, upon Elizabeth R. Eaton interposing a claim for the proceeds, the court at Defiance decided that these (about $2,600) belonged to and was payable to John Newbegin, as Eaton's attorney, B. Eaton, and collected this amount for him. October 1st, 1874, Holgate exercised the option which he had reserved in the contract by deciding to keep the lands, and notified John B. Eaton to that effect.

It is conceded that at the time of the purchase and the contract Holgate had no knowledge of any interest which Mrs. Eaton might have in the proceeds except for dower. Some difficulty being found by J. B. Eaton in obtaining his wife's signature to a deed, he assented to the balance of the purchase money being paid to her.

Accordingly in June, 1875, two notes and the mortgage of the lands thus purchased, excluding the lands condemned by

the railroad company, were executed by defendants Newbegin and Holgate, bearing date October 1st, 1874, for $1,500 each, payable to Elizabeth R. Eaton, with interest annually. These notes and mortgage are those upon which this suit is brought. They were sent to Mrs. Eaton, and with them a deed of the lands drawn up by defendants, to be signed by John B. Eaton and wife, from which the lands were excepted to which the Baltimore, Pittsburgh & Chicago Railway had acquired right and title. This was June 8th, 1875.

The court, it appears, at that time had not decided the controversy as to J. B. Eaton's right to the proceeds of this appropriation. July 6th, 1875, Newbegin writes to Mrs. Eaton "whether you take this money or not (referring to the mortgage notes payable to her) Mr. Holgate can hold the land. He has a deed conveying it from Mr. Eaton which, beyond all question, gives him title, in my opinion, for two reasons: First. It was a personal trust and the deed gives him good title. Second. Mr. Eaton had the legal title to the land and Mr. Holgate bought of him without any knowledge of your claim."

To this Mrs. Eaton claimed that she had a separate estate in the lands; that the contract was made without her knowledge, and contrary to her wishes, and that she was not willing to sign the deed till the suit then pending relating to the disposition of the proceeds of the portion of the lands appropriated by the railroad company should be terminated.

A considerable correspondence passed between the parties during the succeeding year. In February, 1876, Newbegin writes to R. I. Eaton, complainant, as follows: "We are still willing to do this (pay Mrs. Eaton the balance due on the land, $3,000) whenever we receive that deed back properly executed. We are in possession of the land under a perfect legal title, as we claim. Since which you and your mother are setting up claim to it. To forever dispose of this claim I shall in due time file a bill in court to quiet title." Later in the same year R. I. Eaton, the son of the complainant, inquires of Newbegin whether he is ready to relinquish his interest in the land, to which he replies that it is impossible to do that, as Mr. Holgate claims title from J. B. Eaton, and he, Newbegin, from Holgate.

In June, 1876, Mr. Holgate writes that upon terms he thinks he would close the matter if repayment in thirty days of money expended and advanced were made, with bank interest, and in consideration of J. B. Eaton's joining in a recision of the contract. No result follows except that in September, 1876, R. I. Eaton announces to the other parties that Mrs. Eaton had executed this deed. This deed from J. B. Eaton and his wife was executed September 27th, 1876, and tendered December 7th, 1876, and before any recision of the contract on the part of the defendants, and without any offer on their part to re-convey the property in controversy. The deed so tendered by complainant included all the lands conveyed to J. B. Eaton by the sheriff, except the Michael Gorman place; also Weisengerber mill lot and land northwest of the Toledo, Wabash & W. R. R., which had been, since the deed by Eaton to Holgate, appropriated by the railroad company.

In short, the deed covered and conveyed all the property covered by the contract, and exactly described the identical property described in the mortgage executed by defendants and sent to complainant, as above stated.

This deed was returned the day after its receipt. The mortgage and notes which had been the subject of foreclosure at Defiance, and which Eaton in his contract had agreed to forward "if he could find them," were not produced until the trial before the referee, when they were brought forward and tendered. It is in proof that the defendants were in such possession as the nature of the lands permitted from the date of the execution of the contract until after the commencement of the suit, and exercised ownership over the same by leasing and receiving small amounts of rent for the use of the same.

A decree was rendered by the Circuit Court for the Northern District of Ohio, at its January term A. D. 1882, in favor of complainant, finding that complainant was entitled to have the mortgage referred to in the bill foreclosed, and that the amount due thereon on the 3d day of January, 1882, being the first day of that term, including principal and interest, was $4,310, and ordered a sale of the premises in satisfaction of the amount due, and that in case the proceeds from the sale were not sufficient to pay the amount and costs so decreed in favor of the complain-

ant, that an execution issue against the said Holgate and said Newbegin for the amount of the deficiency. Said court further dismissed said cross bill of defendants.

From this decree the defendants have appealed to this court.

ARGUMENT.

Counsel for appellee respectfully submit:

That the original transaction between John B. Eaton and William C. Holgate, defendants, was one of absolute sale pure and simple. The court need only refer to the contract itself, coupled with the deed of absolute conveyance made July 30, 1874, to find that we are correct in this. (For contract, *vide* Record, page 87; for deed, see Record, page 111.) The transaction begins with a deed of absolute conveyance from Eaton to Holgate, and it is accompanied with a contract signed by the parties which refers to the deed contemporaneously made. The contract declares a sale of the real estate *in præsenti*, as evidenced by the deed. * * * It stipulates for the payment of the purchase price, to wit: six thousand dollars, and the terms of the payment. There is no suggestion that the contract or deed is made to cover loan or advancements—it is a purchase and sale absolute. The contract provides, it is true, that if the purchaser elects any time before the first day of October following, not to retain the property it shall be "repurchased" of him by the vender. Here the term "repurchase" is used.

In case of election to "repurchase," then the moneys which had been paid are to be refunded. Later on, the contract speaks of the land as purchased. The contract stipulates that if a "repurchase" is elected the election shall be made on or before October 1st, 1884. This election of repurchase was not made; on the contrary, information was given that the purchase would be abided by: *vide* Record, page 90, letter of Holgate to John B. Eaton, beginning, "In reference to your sale to me," etc., * * * "I write to say I expect to hold the same agreeably to the terms and spirit of the contract." * *
(See also letter of Newbegin to Eaton, January 7, 1875, Record,

page 90; see also letter of Holgate to Mrs. Eaton, June 8, 1875, Record, page 92,) and no information of intention to rescind the contract was ever given until after the deed executed by Mr. Eaton and Mrs. Eaton had been tendered to the defendants, December 7, 1876. We have, then, here an absolute purchase, sale and conveyance by warranty deed from John B. Eaton, who held the title to the lands on July 30, 1874, (vide Record, page 44, testimony of defendant Newbegin, and also, page 94, testimony of defendant Newbegin), and the obligation on the part of Holgate, the purchaser, to pay for it six thousand dollars, with interest, from October 1st, 1874, the balance of this purchase price, namely, $3,000, with interest, from October 1st, 1874, to January 3, 1882, the first day of the term of the Circuit Court, to wit: $4,310, is the amount decreed by said court in favor of said complainant.

It was provided in the contract that Eaton should procure another deed to be signed by himself and wife. The object of this was, according to the testimony of Holgate, (vide Record, page 74) to procure the release of dower; but it appears from the facts in the case that Mrs. Eaton had and could have no dower in the premises, hence a joint deed signed by her was unimportant, even if the same had not been, as we shall see was, tendered in due time of law.

The conduct of the parties during all the subsequent correspondence relating to the respective obligations shows that the defendants, on their part, regarded the title and the property as legally conveyed by Eaton, and a joint deed was only required to quiet them in the ownership from any possible claims which Mrs. Eaton might set up, and to make proceedings by bill to quiet title in the purchase unnecessary. (See Record, page 90, letter of Newbegin to John B. Eaton, January 3, 1874; and page 94, letter of Newbegin to Elizabeth R. Eaton, July 6, 1875, and page 97, letter of Newbegin to Rufus I. Eaton, of February 19, 1876, and page 99, letter of Newbegin to R. I. Eaton, of April 24, 1876.) It is significant to notice here that in the letter of Holgate to Rufus I. Eaton, on page 105 of the Record, although the letter appears dated November 13, 1876, the postscript at the bottom of the letter was dated December 7, 1876, so that the letter was not written and sent until after the receipt by the

defendant, Holgate, of the joint deed executed by Mr. and Mrs. Eaton. (*Vide* in support of this point, page 72 of the Record, where Holgate substantially admits that no attempt was made to rescind the contract until after the receipt of the joint deed by him, December 7, 1876.) The time of delivering this joint deed was not essential—the time here is not the essence of the contract, because the procuring of the second deed signed by Mrs. Eaton was entirely nugatory, inasmuch as Holgate, and the purchaser from him had a perfect title in law and equity, and if necessary to be made under the terms of the contract, the time for doing this was certainly non-essential, so that being procured and tendered before the contract was lawfully terminated between the parties this condition would be sufficiently fulfilled in due time of law. The time for doing this, by the act of the defendants themselves, was expressly made non-essential; they retained the title and the possession and insisted upon the completion of the contract and their rights to the property without any offer to rescind or to re-convey, and firmly persisted in all ways to keep the contract alive and in force. They threatened, as we have shown by the Record above, to file a bill to quiet title, which, of course, is only done where the title is perfect and some unfounded pretenses are sought to be done away with; and insisted and kept insisting until after the tender of the joint deed was made them, that it should be executed and delivered to them. After the deed had been tendered it was too late for them to seek to rescind. It is significant also to notice that when the joint deed was delayed to be sent on, there is no call made for the return of the notes and mortgage; they are allowed to continue in the hands of Mrs. Eaton, perpetually tendered to her, and finally, and before any recision of the contract, this tender is formally accepted by the sending on of the joint deed and the demand of the payment of the notes and mortgage. It is then too late for them to seek to rescind the contract.

Should it be objected that the contract also stipulates, on the part of Eaton, that he would procure to be filed the notes and mortgage on which the foreclosure occurred at Defiance, and under which he (Mr. Eaton) purchased the lands in question, we say:

a. That he was only to do this in case "he could find the same" by the terms of the contract, and there is no proof that he could do so.

It is not for us to prove the negative; it is enough for us to say that if he could have found them he would have sent them on; and no objection is made by either of the defendants to their not having been sent on, in any of their correspondence; nor is any claim for this made in their answer to the original bill filed in this case.

b. It was entirely immaterial and unimportant to the interest of the purchaser whether these said notes and mortgage were sent on and filed or not; they had been merged in the foreclosure, so they were utterly valueless and inoperative for any purpose. No law or security to the purchaser required them to be found and filed.

c. If of any importance whatever, they have been found and tendered at the hearing to the defendant.

Should it be objected that the joint conveyance of Mr. and Mrs. Eaton did not describe the whole of the lands, we say:

a. That, as we have above stated, no such deed was necessary.

b. That it did describe the whole of the land excepting what had been condemned by the railroad company, to which reference is made in the contract; and further, that the mortgage which they sent to Mrs. Eaton omits the land condemned by the railroad company, but at the same time states that the land described in the mortgage is the same as that described in the deed which they sent on for Eaton and his wife to sign. (See Record, pages 117 and 116.) The description in that deed, they say, excepted the user of the railroad company to a certain portion. This must have been regarded as substantially excepting the land itself, for they say that the land described in the mortgage is the same as that described in the deed, and the joint deed finally tendered conveys exactly the same premises as are described in the mortgage itself, and makes particular reference to the deed of John B. Eaton to William C. Holgate.

c. Again, the land condemned by the railroad company under the statute, became the absolute property of the railroad

company. The sections of the statutes relating to the appropriation of lands by railroad companies are sections 6414 to 6453, both inclusive, of the Revised Statutes of Ohio. These provide for appropriation proceedings, testimony as to the value of the lands, and a verdict by a jury of the damages to be awarded for such appropriation.

Section 6433 Revised Statutes of Ohio reads as follows: "Upon payment to the party entitled thereto, or on deposit with the probate judge of the amount of the verdict and such costs as have lawfully accrued in the case up to that time against the corporation, the corporation shall be entitled to take possession of, and shall hold the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition, and the judge shall enter of record an order to that effect, etc."

We submit that under this statute the land condemned by the railroad company became the absolute property of the company. It is true that the statute provides for the condemnation of the land for the *uses* of the railroad company, but when thus condemned and its value paid for it becomes the absolute property of the company for its uses, and there could be no residuary or reversionary interest, whether the railroad company ceased to use it for railroad purposes or not, since under the appropriation proceeding the entire value of the land as fixed by the jury has been paid for by the railroad company. Hence in this view, the joint deed of Eaton and wife covered the entire premises to be conveyed by them and certainly the entire premises mortgaged back to them. The contract provided that the purchaser should give a mortgage back on the premises conveyed to secure the purchase money, and the mortgage they sent to Mrs. Eaton described the premises according to their understanding of the contract as the premises purchased, and the joint deed from Mrs. and Mr. Eaton covered the same premises. Besides, and as conclusive on this point, the deed of July 30th, 1874 (*vide* Record, page 111), covers the entire premises and secures to defendants the reversion if there be any. As significant on this point (*vide* Record, page 91), letter of Henry Newbegin to John B. Eaton, dated June 7th, 1875, where he says: "I have sent you a deed to wife, except-

ing this railroad property condemned, for reason that the deed you took away from here for execution warrants title to the whole land, and I should not want you nor wife to make such warranty." Also, Record, page 94, letter of Newbegin to Mrs. Elizabeth R. Eaton, dated July 6th, 1875, where he says: "I conceive of no reason for your reluctance to sign the deed. This has nothing to do with the land taken by the railroad."

It is significant also to note that in their answer to the original bill they simply deny "that pursuant to the terms of the said contract, after the 1st of October, 1874, at the request of said Holgate, a new deed of warranty of said lot or parcel of land was executed by said John B. Eaton and his said wife, the complainant herein, and tendered to the defendants:" (*vide* Record, page 10); also that in their cross-petition filed in said case, they made no reference to deed having been tendered them at all, but claim their right to be relieved from liability upon the recision of the contract made by them in a letter to Elizabeth R. Eaton, dated June 13th, 1876 (*vide* Record, page 15). That this letter was not any recision of the contract and did not contain even any unqualified offer to rescind (*vide* Record, page 101).

As bearing upon the point that when lands are condemned by a railroad company, the reversion, if any, is too trifling to be considered by the court, *vide*

Robbins *vs.* St. Paul R. R. Co., 22 Minn., 286.
Terry *vs.* N. Y. C. R. R., 67 How. (N. Y.) p. 439.

Especially is this so when the statute, as in Ohio, gives the railroad the property rights acquired by condemnation proceedings, practically forever. It is sufficient to say that the deed described precisely the same property as did the mortgage drawn by the defendants themselves: the contract providing, as it does, that the mortgage should cover the property purchased.

Again, it is quite clear, irrespective of the notes and mortgage, and although the original bill in this case asks to foreclose them, that inasmuch as the bill sets out the price to be paid for the land to be evidenced by notes if the "vendor" should require them, yet, independent of these notes there is a "vendor's"

lien for the unpaid purchase money as stipulated for in the contract, which can be enforced in this proceeding under the general prayer for relief. This "vendor's" lien independent of any notes existed in J. B. Eaton for himself and for the beneficiaries in the trust. These beneficiaries were his wife and children. He has died and she has also died. These children, consisting of R. I. Eaton, the complainant, and the other four children made parties by the supplemental bill, have succeeded to, and are now the owners of this vendor's lien, and may enforce it as above stated, notes or no notes, or whether Mrs. Eaton rightfully or wrongfully retained them. That the complainant and the other children are the beneficiaries in interest (*vide* Record, page 124, will of Mr. Allen: and Record, page 120, showing assignment of mortgage on the foreclosure of which J. B. Eaton obtained title to the property; and Record, page 44, testimony of defendant, Newbegin, showing that J. B. Eaton obtained title to the property under the foreclosure of that mortgage. See also R. I. Eaton's testimony, Record, page 83;) indeed, this fact is admitted by the defendants, and all testimony offered on that point was admitted without objection.

POINTS.

We therefore respectfully submit the following points:

1st. That July 30th, 1874, John B. Eaton held the legal title in fee of the lands in question.

2d. That, in point of fact, he held it in trust for his wife and children. And this, not only because this property was the proceeds of property originally willed by one Allen to Mrs. Eaton and her children, but, second, because the notes and mortgage, under a foreclosure of which the title to this property had been acquired by John B. Eaton, had been assigned to him as trustee for his wife and children.

3d. That John B. Eaton, thus holding the legal title in fee to this land, of record, apparently with no trust attached, sold to Holgate the lands, with no knowledge on the part of, or notice to, Holgate of the existence of any trust.

4th. That, by reason of this sale, Holgate acquired a good and perfect title, and that if this were not so, the subsequent ratification of the sale by the *cestuisque trust* would perfect his title.

5th. That on said 30th of July, 1874, Holgate purchased absolutely of John B. Eaton, and John B. Eaton absolutely sold to Holgate, the land in question; that the transaction was not in the nature of a mortgage; that the advances made were not advances or loans to be repaid, but advances and loans specifically provided for, to be made under the contract as a part of the purchase price, and only to be returned in case the purchaser should subsequently elect to re-sell and re-convey the premises to the vendor; that the sale, therefore, as shown by the warranty deed and the contract, was an absolute sale *in præsenti*, vesting in Holgate, from the time the deed was delivered to him, an absolute and clear title, divested of any trust or equities, and not chargeable with any dower interest, because, it being trust property, Mrs. Eaton could have no dower in it.

6th. That under this deed Holgate took immediate possession, and has ever since continued in possession, receiving rents, to a small amount, and in a situation, so far as title was concerned, to realize more from the property, if he had seen fit so to do.

7th. That the procuring by Eaton of a second deed, signed by himself and wife jointly, was entirely nugatory and unimportant to the defendants, inasmuch as Holgate and the purchaser from him had already a perfect title in law and equity. That if important or to be exacted under the terms of the contract, then the time of doing this was not essential, and so that procured and tendered before the contract had been in any way lawfully terminated between the parties, then this condition would be sufficiently fulfilled; and that, especially as defendants made delay in procuring and furnishing them this deed, no ground for annulling the contract, but, on the contrary, persisted in having the deed procured, it shows that time, by the act of these defendants, was expressly made non-essential, and that so a joint deed was tendered at any time during the life of the contract, it would be a fulfilling of the technical terms of the

contract in this respect; and further, that the deed tendered described the same premises substantially as in the mortgage sent on to Mrs. Eaton.

8th. That the undertaking on the part of Eaton in the contract to procure the notes and mortgage on which the decree had been rendered, was only on condition of his ability to procure them, and that they have now been procured and tendered on the hearing; and that their not having been procured earlier is presumably because Eaton could not obtain them, or, if he could, that the obtaining and furnishing these defunct obligations had no legal or possible importance or consideration.

9th. That whatever were the conditions on which Mrs. Eaton was to consider herself to have the control and right of enforcement, for herself and her children, of these two notes and mortgage now in suit, they certainly, after her refusal to sign the deed or recognize the contract, remained in her possession without being recalled, and so that when she fulfilled the technical condition, as claimed, on which she was to become the proprietor of the notes and mortgage, by tendering the joint deed, she came into the full right of enforcing the payment of the notes by foreclosure, as by the bill originally filed by her by her next friend.

10th. But that, independent of the notes and mortgage, there was a vendor's lien for the unpaid purchase price of $6,000 shown by the deed and contract; and this vendor's lien, by descent, has vested in the children of Mr. and Mrs. Eaton, all of whom are now parties to this proceeding, and who, of course, can enforce this lien under the prayer for general relief, it appearing that these notes and mortgage are simply evidences of indebtedness for unpaid purchase money of the lands in question.

11th. That if the non-performance, on the part of Eaton, of any of the undertakings of said contract on his part to be performed, was to be made a ground of objection, or of claim for recision of contract, or of a right to resell, for the reason that they were not performed as soon as the vendee desired to have them performed, the vendee was bound to so notify the vendor and parties connected with him in interest, and to take steps to

rescind the contract—one of which steps would necessarily be to tender a reconveyance and demand a repayment of moneys paid; and that the defendants, having entirely failed to do any of these things, but, on the contrary, insisting upon their right to hold the lands and enforce the contract, waived all objection as to the time of fulfillment, so that when these conditions were fulfilled, it was too late for them to undertake to rescind; that the contract between the parties was in full force and substantially fulfilled by the vendor for himself and those interested under him at the time this suit was instituted. And,

12th, That the complainant is entitled to a decree for the $4,310 claimed, with interest from January 3, 1882, and for a sale of the lands in question to satisfy the same, whether the amount found due on the purchase price of the land be evidenced and supported by the notes and mortgage, or by the fact that it is an amount remaining due of the purchase price; for which the children of Eaton have a vendor's lien by inheritance, as well as by the fact that they were beneficiaries in the sale made by their father: in short, that the decree of the Circuit Court should be affirmed.

Respectfully submitted,

H. S. SHERMAN,
J. H. HOYT,
Solicitors for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1885.

No. 75.

WILLIAM C. HOLGATE
AND ANOTHER,
vs.
RUFUS I. EATON,
ADMINISTRATOR, &c.
} *ON APPEAL.*

BRIEF FOR APPELLEE,

IN REPLY TO APPELLANT'S BRIEF.

H. S. SHERMAN,
J. H. HOYT,
} *Counsel for Appellee.*

CLEVELAND, O.:
J. B. SAVAGE, PRINTER, FRANKFORT ST.
1885.

SUPREME COURT OF THE UNITED STATES.

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NO. 75.

WILLIAM C. HOLGATE AND HENRY NEWBEGIN,
APPELLANTS,

vs.

RUFUS I. EATON, ADMINISTRATOR, ETC.,
APPELLEE.

BRIEF OF APPELLEE IN REPLY.

ARGUMENT.

I.

Jurisdiction.—Counsel for appellee refer to the brief filed for appellee on the motion to dismiss, and desire on this point only to add the following:

1st. The claim of appellants is not in the nature of a counter claim or set-off, and hence this case is distinguishable from Bradstreet Company *vs.* Higgins, 112 U. S. 227; nor does it come within the rule laid down in Hilton *vs.* Dickinson, 108 U. S. 175, where the court says on page 175:

"And we have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when having pleaded a set-off or counter claim for *enough to give us juris-*

diction he is defeated upon his plea altogether, or recovers only an amount or value which being deducted from his claim as pleaded leaves enough to give us jurisdiction which has not been allowed."

Defendants nowhere plead any counter claim or set-off in their answer to the original bill filed in this case (vide Rec., page 5). The issue raised by the bill and answer is simply whether there was a sale of the premises to defendants; if there was we ask for the balance of the purchase price—a sum less than the jurisdictional amount—and the foreclosure of the mortgage and notes given for this balance. It is true that in a cross-bill defendants claim a lien upon the same premises for the amount already paid by them on the purchase price, to-wit: $824.24; but this sum is not sufficient in itself to give the court jurisdiction, nor is there dispute between the parties, but that if there be no *sale* of the premises to them they are entitled to this amount. It is not at all like a case of counter-claim or set-off the items or amount of which are disputed. If there was no sale this amount is not disputed; nor is it if there were a sale, since it is already credited to them on the purchase price.

2d. During the pendency of the suit, Mrs. Eaton, original complainant, died. The original bill and amended bill were revived, the cross-bill never was; hence the distinct cause of action made in the cross-bill has abated by this death, and is not, and can not now be, brought into this court at all. That wherever there is an original bill and cross-bill, each must be revived if an abatement occurs, vide Story's Equity Pleadings, 9th ed. § 363 and references.

Hence the cause of action made in the original bill and amended bill is the only one revived; the only one before the court below and the only one before this court, and the amount involved therein is not enough to confer jurisdiction.

II.

It is sufficient to say, in answer to the second point made in appellants' brief, that all the parties in interest were before the court: John B. Eaton by the amended bill (see page 5), and after the revival of the suit, all the heirs of both Mr. and Mrs.

Eaton, the beneficiaries of the trust as well, by supplemental bill (see page 26); and all questions affecting their rights could be, and were, authoritatively settled by the court, and in accordance with the merits. The defendants, without raising any technical objections, went to hearing upon the merits. Any objections that might have been made, or even were made, when it appears that they are wholly immaterial to the merits, are no longer assignable as error.

Greenleaf *vs.* Birth, 5 Pet., 134.
Hardin *vs.* Boyd, 113 U. S., 762.

The decree below was right and will not be reversed for

The doctrine is general that a party who seeks to rescind, avoid, or abandon a contract on the ground of fraud, mistake, defect of title, and the like, must do so with promptness and diligence as soon as the facts constituting the objection are discovered by him. If a vendee retains possession and enjoyment of the premises after notice of the facts giving him the right to rescind or abandon, he certainly thereby waives the objection and his right to avail himself of it.

Pomeroy on Contracts (Specific Performance), § 418, note 3, and cases cited.

Foley *vs.* Crow, 37 Md., 51.

If both parties have been in default with respect to the time of performance the contract will be specifically enforced.

Pomeroy on Contracts (Specific Performance), § 420, note 5, and cases cited.

(*a*) That by the consent reference to the master, the full hearing upon the merits, where no decree pro confesso was entered on cross-bill, any objection to the failure to amend has been waived. Vide Strong *vs.* Willey; Mobile & Montgomery R. Co. *vs.* Juvey, and other cases cited above, and Kittridge *vs.* Race, 92 U. S., 116.

(*b*) If not waived, no decree pro confesso, was taken and no further answer insisted on under the rule.

Rule 64.

(*c*) But the suit on the cross-bill had abated by the death of Mrs. Eaton and had never been revived, hence no amendment to answer was necessary.

Story's Equity Pleading, 9th ed., § 363 and references.

(*d*) But if none of the above points are well taken, still, by a failure to amend it can only be held that the facts stated in the exceptions are admitted to be true.

Rule 64.

The facts stated in the first exception are admitted to be true. Mrs. Eaton at first did object to the contract, and it was not until compelled by the acts and threats of the defendants, that she finally consented to the purchase and tendered the deed while defendants were still insisting on their title to the property, and before any recision was even attempted by them.

The facts stated in the second exception defendants might have taken as admitted—that is, if points *a*, *b*, and *c* are not well taken by us—but they did not do so; but on the contrary, offered in evidence, themselves, the letter of Holgate, dated June 8th, 1875 (Record, p. 92) enclosing the notes and mortgage, which makes no mention of a conditional delivery of the notes and mortgage at all, but states in terms that the notes and mortgage are sent her for the balance of "the purchase price," and because she has a "special interest in the matter," and at Mr. Eaton's "express wish;" so that defendants by their own testimony expressly disprove the facts stated in the second exception to the answer.

IV.

We claim the suit was properly revived by the administrator. Mrs. Eaton had indeed a life estate in the mortgage and notes, but that entitled her to all interest accrued on the same from their date, Oct. 1st, 1874, until her death, Oct. 10th, 1878. And this interest properly belonged to her estate, and supports the reviver by her administrator. But all her heirs and the beneficiaries in the trust are made parties by supplemental bill, and in their answer expressly ask for the foreclosure prayed in the bill. Nor are they objecting to or appealing from the decree rendered. So that all the parties in interest were before the court.

We claim further that any objection to the revival has been waived by the defendants, and cite the authorities referred to under Point II above. No objection was made, at the hearing before the Master, in the exceptions to his report, at the hearing before the court, or in the two petitions for a rehearing. Any objection on this point should have been made below.

V.

To the objection that no replication was filed to the joint answer of the sons of Mrs Eaton, made parties by the supplemental bill, we need only refer to

Story's Eq. Pl., 9th ed., §§ 457, 877.
Reynolds *vs.* Crawfordsville Bk., 112 U. S., 409.
National Bank *vs.* Ins. Co., 104 U. S., 54.

VI.

We have sufficiently argued the case on the merits, in the brief formerly filed by us, and desire only to call the attention of the court to the fact, that the objection made by appellants, that the reversionary interest in the property condemned by the railroad was not conveyed to them in the deed tendered Dec. 7th, 1876, is not well taken, not only for the reasons stated in our former brief on pages 9, 10 and 11, but because the decree of the Circuit Court ordered all the parties in interest to